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## Private Standards Organizations and Public Law

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# Private Standards Organizations and Public Law

Peter L. Strauss\*

*Legal information institutes of the world, meeting in Montreal, declare that:*

- *Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;*
- *Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;*
- *Organisations such as legal information institutes have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published by other parties. ...\*\**

*"We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of."\*\*\**

## *Abstract*

Simplified, universal access to law is one of the important transformations worked by the digital age. With the replacement of physical by digital copies, citizens ordinarily need travel only to the

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\* Betts Professor of Law Columbia Law School. Thanks are due to many others, including: the participants in the comparative administrative law symposium in Luxembourg, June 5-6, 2012; Joe Bhatia and Scott Cooper of the American National Standards Association; Rae McQuade of the North American Energy Standards Board; Carl Malamud of Public Resource.Org; Emily Bremer of the Administrative Conference of the United States; Professor Bruce Ackerman; and my colleagues Jane Ginsberg, David Pozen, William Simon, and Timothy Wu. Jared Miller, '14, provided indispensable research assistance. Errors, of course, are my own. Readers should be aware that, although attempting a balanced account here, I am an interested party, having filed the petition for rulemaking discussed at some length within, and which lies behind the body of commentary to the National Archives and Records Administration [NARA] and to the Office of Information and Regulatory Affairs [OIRA] often called in following footnotes. These are FDMS dockets NARA-2012-0002 and OMB-2012-0003, which may be found on Regulations.gov. (Note that subsequent footnotes omit the location of the FDMS dockets, and take the form FDMS Docket XXXX-2012-YYYY or, for specific documents in the docket, FDMS Docket XXXX-2012-YYYY-ZZZZ.) I am an active member of the Administrative Law and Regulatory Practice section of the American Bar Association; while my efforts contributed to its interest in the matter, I did not significantly contribute to its comments filed in these dockets.

\*\* Montreal Declaration on Free Access to Law (2002), available at <http://www.canlii.org/en/info/mtldeclaration.html> (visited August 29, 2012).

\*\*\* 5 Bentham, Works 547 (1843); Erwin N. Griswold used this as the epigram to his Government in Ignorance of the Law--A Plea for Better Publication of Executive Legislation, 48 HARV. L. REV. 198 (1934).

nearest computer to find and read the texts that bind them. Lagging behind this development, however, has been computer access to standards developed by private standards development organizations, often under the umbrella of the American National Standards Institute, and then converted by agency actions incorporating them by reference into legal obligations. To discover what colors OSHA requires for use in workplace caution signs, one must purchase from ANSI the standard OSHA has referenced in its regulations, at the price ANSI chooses to charge for it.

The regulations governing incorporation by reference as a federal matter have not been revised since 1982, and so do not address the changes the digital age has brought about in what it means for incorporated matter to be “reasonably available,” as 5 U.S.C. §552(a)(1) requires. This essay seeks to bridge that gap, suggesting a variety of approaches that might bring the use of incorporation by reference into conformity with modern rulemaking practices and respect the general proposition that documents stating citizens’ legal obligations are not subject to copyright, while at the same time both honoring clear federal statutory policy favoring the use of privately developed standards in rulemaking and respecting the needs standards organizations have to find reasonable means to support the costs of their operations. Business models created in the age of print need to change; the challenge is to find ways to permit the market in privately developed voluntary standards to thrive, without thereby permitting the monopoly pricing of access to governing law.

## I. INTRODUCTION

### A. Voluntary Consensus Standards

This essay addresses the public/private confusions over standards development organizations' work. SDOs are private non-governmental bodies that have long existed to create voluntary private standards by which to declare or measure the characteristics of goods on the marketplace. Throughout the world, manufacturing and markets are greatly aided, and consumers offered protection, by the application of uniform industrial standards created independent of law, as means of assuring quality, compatibility, and other highly desired market characteristics. They define what is meant by U.S. Hard Red Spring Wheat,<sup>1</sup> reflect railroads’ agreement on track widths permitting

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<sup>1</sup> Now defined by the Department of Agriculture, <http://www.gipsa.usda.gov/fgis/standards/810wheat.pdf> (visited Nov. 25, 2012).

interchangeability, establish threading conventions for nuts and bolts,<sup>2</sup> or fix the characteristics of the fittings that attach fire hoses to hydrants.<sup>3</sup> Independent of any legal force they might have, Underwriters Laboratories tags on electric appliances offer buyers assurance of their safety. The thousands of “voluntary consensus standards” SDOs develop for industrial conduct are undeniably beneficial to the operation of markets in complex goods and to public safety.

Hundreds of private SDOs exist in the United States alone. Under the umbrella of the American National Standards Institute [hereinafter ANSI], one finds professional organizations of individual engineers such as the American Society for Testing and Materials [AMST], corporate-membership trade associations such as the American Petroleum Institute [API], and corporations in the business of certifying safety such as Underwriters Laboratories [UL]. Abroad, there is a greater tendency to coordinated national bodies, like the British Standards Institute [BSI], or international bodies such as the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC), and the International Organization for Standardization [ISO].<sup>4</sup>

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<sup>2</sup> For the British Eighth Army, fighting Rommel in north Africa, “British replacements for worn-out parts on their American-made tanks reached the British armed forces just in time – only to be unusable due to literally incompatible nuts and bolts. Differences in British and American threading standards – established in the 1840s and 1860s respectively – thus forced the British commanders to abandon tanks and equipment in the North African desert! ...add[ing] some £25 million to the cost of war.” Tim Büthe and Walter Mattli, *THE NEW GLOBAL RULERS – THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* 130 (2011)

<sup>3</sup> The great Baltimore fire of 1904 became the worse when fire companies called in from Washington, D.C., Philadelphia and other cities found they could not attach their hoses to the city’s hydrants. Tyler Wolf, *Existing in a Legal Limbo: The Precarious Legal Position of Standards Development Organizations*, 65 *Wash. & Lee L. Rev.* 807, 808 (2008),

<sup>4</sup> Tim Büthe and Walter Mattli offer a comprehensive and engaging view of global standards and their impact in *The New Global Rulers: The Privatization of Regulation in the World Economy*, (Princeton 2011)

This essay is particularly concerned with American SDOs, primarily ANSI and the SDOs it has accredited for the generation of “voluntary consensus standards.” Not all standards fit the description “voluntary consensus standards”; some (for example, the standards for Blue-Ray computer disks) may simply be created by a manufacturer hopeful of capturing a certain market; others may be the product of organizations addressing compatibility issues in rapidly developing technologies without seeking to engage wide participation in their work. As the name may suggest, “voluntary consensus standards” are developed using procedures whose breadth of reach and interactive characteristics resemble governmental rulemaking, with adoption requiring an elaborate process of development, reaching a monitored consensus among those responsible within the SDO. ANSI’s “Essential Requirements: Due process requirements for American National Standards”<sup>5</sup> provide in 26 detailed pages a set of procedures both for accreditation and audit of SDOs wishing to develop American National Standards and for the consideration of individual standards. Standards, once adopted, are copyrighted as the intellectual property of the developing SDO, and offered for sale through ANSI, SDO websites, or third-party publishers. While SDOs are generally non-profit organizations and rely heavily on the voluntary work of engineers or others versed in the technical issues involved, fulfilling the required procedures imposes administrative costs that must somehow be financed.<sup>6</sup> For the professional societies, if not for the trade associations or corporate developers

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<sup>5</sup> See ANSI’s “Essential Requirements” for standards generation, at [http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2012%20ANSI%20Essential%20Requirements%20and%20other%20Updated%20Procedures/2012\\_ANSI\\_Essential\\_Requirements.pdf](http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2012%20ANSI%20Essential%20Requirements%20and%20other%20Updated%20Procedures/2012_ANSI_Essential_Requirements.pdf) (Visited November 20, 2012).

<sup>6</sup> “Not-for-profit” indicates an accepted public-serving purpose, freedom from taxation, and the absence of shareholders (owners) who might be paid dividends out of a surplus resulting from an excess of revenue over expenditures. Expenditures, however, may include compensation packages that, for high-ranking executives as for university football coaches, can reach seven figures. See, e.g., FDMS Docket NARA-12-0002-0082, at 4 (Comment from Carl Malamud, President, Public.Resource.Org) ( listing table of salaries for executives at leading SDOs, ranging  
(continued...)

of standards, these costs are substantially financed through membership dues paid to participate in their processes and through the sale of their copyrighted standards.<sup>7</sup>

Although anti-competitive uses of standards are not unknown, and success in establishing one's preferences as an *international* standard, especially, may have significant financial consequences for participants in international markets – favoring some and imposing additional costs on others<sup>8</sup> – standards are, on the whole, both necessary and beneficial. Complex markets could not operate without them. The processes ANSI and other organizations have developed to assure consensus and provide safeguards against their abuse seem generally effective and, within the industrial community as a whole there is every motivation to support them. This paper takes no issue with their development and use as voluntary consensus standards and accepts that, at least where standards may compete with one another,<sup>9</sup> market forces may work to control owners' exploitation of copyrights in them.

## B. Their Occasional Conversion Into Legal Obligations

Increasingly, American governments – federal, state, and local – have been adopting part or all

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<sup>6</sup> (...continued)  
from \$420,960 to \$2,075,984) . The possibility that the prices set by SDOs are self-serving, then, cannot be excluded.

<sup>7</sup> See, e.g. National Fire Protection Association, "Content Strategy" (Feb. 2012), available at <http://www.nfpa.org/itemdetail.asp?categoryid=2436&itemid=55491&url=about%20nfpa/content%20strategy> (Visited December 25, 2012). Remarking in one breath "We have had great success over the years using a business model in which the principal source of revenue was the sale of print editions of our codes and standards," the document next observes "That business model is no longer sustainable." This is the reality with which this paper is concerned.

<sup>8</sup> Bütthe and Mattli, n. 4 above, present this as the organizing theme of their important work.

<sup>9</sup> Ibid.

of some of these standards (e.g., what standardized colors should be used for caution signs in a work-place) as regulatory requirements. Incorporation by reference at the state and local level both greatly eases the work of governments and arms markets. If the Southern Building Code Congress International and its competitors<sup>10</sup> had not drawn up model building codes, each small town would have been obliged to develop its own, at high cost and low efficiency; as a result, builders and manufacturers of building materials might have found their markets extraordinarily complex. With a model code in place, builders will know that materials meeting its standards are acceptable for construction, and material suppliers will learn what qualities in their goods will likely satisfy the market as a whole.<sup>11</sup> (What benefits the village of Hastings on Hudson may also benefit the maker and users of nuclear power plant equipment having the benefit of standards developed by the American Nuclear Society – as well, it may be hoped, as neighbors to the plant wishing assurance of its safety.) For a commercial builder, too, the cost of acquiring copies of the relevant adopted codes is likely trivial in relation to its other expenses; but for the homeowner who wishes himself to make code-compliant alterations in his own home, this may not be true, and in that possibility lies much of the impulse for this paper.

At the federal level, the conversion of standards into legal obligations through incorporation by reference had its origin primarily in a wish to protect the utility of the Federal Register and the Code of Federal Regulations, reducing their otherwise necessary size by thousands of printed pages, and

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<sup>10</sup> Building Officials Code Administrators International [BOCA], International Conference of Building Officials [ICBO], International Code Council [ICC], National Fire Protection Association [NFPA]

<sup>11</sup> Delaware's State Fire Prevention Commission, for example, recently adopted the National Electrical Manufacturers' Association's National Electric Code of 2011, with two amendments, as minimum standards binding on all local jurisdictions in the state. <http://www.nema.org/Technical/Code-Alerts/Pages/05-December---Delaware.aspx>.



secondarily in the hope of giving a kick-start to new federal safety programs, by converting to legal obligations consensus standards already in place. The American Administrative Procedure Act has long required the publication of legally binding agency regulations in both the federal daily journal of record, the Federal Register, and the compendium of regulations, the Code of Federal Regulations [CFR]. No one would claim that the material thus published is subject to copyright; but when industry standards are incorporated by reference, they are merely identified by name and source. Their contents are not published – that is, indeed, the point in protecting the volume of the Federal Register and the CFR – and to know those contents one must ordinarily purchase them from their copyright owner. Section 552(a)(1) of the APA states a procedure for incorporation by reference, that offers no direct guidance on the question whether an SDO standard incorporated not as a *possible* technical means for compliance, but *as law*, remains in the copyright control of its creator:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— ...

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. *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.* [Emphases added.]

The Director has implemented this provision by regulations discussed within, that at present do not define what it means for matter to be “reasonably available” beyond requiring single copies to be

deposited with the National Archives and retained in agency libraries.<sup>12</sup>

More recent measures, and the realities of shrinking federal regulatory resources, have both encouraged the practice of incorporation, and created a federal framework for participation and oversight. The Reagan administration, noted generally for its deregulatory emphasis, formulated an OMB Circular, A-119, strongly encouraging a preference for privately generated standards over agency-generated standards where the former were available.<sup>13</sup> In 1988, the transformation of the National Bureau of Standards – the guardian of national standards for weights, measures, and the like – into the Commerce Department’s National Institute of Standards and Technology (NIST) provided a bureaucracy to implement this preference.<sup>14</sup> During President Clinton’s administration, passage of the National Technology Transfer Advancement Act of 1995<sup>15</sup> [NTTAA] gave Circular A-119 statutory force by requiring federal agencies to “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,” absent a specific finding of their inadequacy.<sup>16</sup> Although “technical standards” are defined in a way that focuses on interoperability<sup>17</sup> and appears to suppose

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<sup>12</sup> See n. 80 within.

<sup>13</sup> See H.R. Rep. No. 104-390 at 25 (1995) (recounting history of Circular A-119).

<sup>14</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5111-5115, 102 Stat. 1107, 1427-1433.

<sup>15</sup> P.L. 104-113 (1996). Available at <http://standards.gov/nttaa.cfm>.

<sup>16</sup> Sec. 12(d)(1).

<sup>17</sup> *Id.*, s ubsection (4) defines “technical standards” as “performance-based or design-specific technical specifications and related management systems practices.”

the existence of independently stated regulatory requirements and consequent likely diminished interest outside regulated communities, even before the NTTAA it was estimated that 10% or more of ANSI standards related to the health and safety of industrial products and processes.<sup>18</sup> The most recent revisions to Circular A-119, in 1998, instruct agencies to take steps to assure openness, balance, transparency, consensus and due process in the procedures SDOs use to develop qualifying standards,<sup>19</sup> and, like the NTTAA itself,<sup>20</sup> provide support for federal agency participation in those activities.<sup>21</sup> The result is to give further impetus to the ANSI “Essential Requirements.”<sup>22</sup>

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<sup>18</sup> Ross E. Cheit, SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS 22 (1990) (900 out of 8,500 ANSI standards then existing considered to relate to health and safety).

<sup>19</sup> “4. What Are Voluntary, Consensus Standards?”

a. For purposes of this policy, “voluntary consensus standards” are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties. For purposes of this Circular, “technical standards that are developed or adopted by voluntary consensus standard bodies” is an equivalent term.

(1) “Voluntary consensus standards bodies” are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, “voluntary, private sector, consensus standards bodies,” as cited in Act, is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:

- (i) Openness.
- (ii) Balance of interest.
- (iii) Due process.
- (vi) An appeals process.

(v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments. ...”

<sup>20</sup> NTTAA §12(d)(2).

<sup>21</sup> “7. What Is The Policy For Federal Participation In Voluntary Consensus Standards Bodies?”

Agencies must consult with voluntary consensus standards bodies, both domestic and international, and must participate with such bodies in the development of voluntary consensus standards when consultation and participation is in the public interest and is compatible with their missions, authorities, priorities, and budget resources. ...”

<sup>22</sup> N. 5 above.

Although Circular A-119 states its application only to “technical standards,” contemporary reports of the use of standards afford no ready means of determining what proportion of them effectively do impose regulatory requirements, and the Office of the Federal Register, in administering Section 552(a)(1), pays that question no heed. The use of standards in lieu of independent federal rulemaking is indeed widespread. In its most recent report, for Fiscal 2009,<sup>23</sup> NIST found that only one agency, the Department of Labor, had reported adopting a government-unique rather than an SDO standard in the preceding year (and that one incorporated 9 SDO standards into a single rule); in contrast, NIST reported the adoption of 363 new SDO standards, many as substitutes for existing, government-unique standards. Nor have agencies been standing by as standards are being developed. In Fiscal 2009, NIST reported, agency personnel participated in 528 SDOs. At this writing, a “Standards Incorporated by Reference” database maintained by NIST<sup>24</sup> lists 9486 standards referred to in the Code of Federal Regulations, and 362 organizations (largely but not exclusively SDOs<sup>25</sup>) whose standards are referred to—ranging from 2229 times for the American Society for Testing and Materials to 113 whose standards are referred to only once.

It is important to be aware that most of the standards referred to in the CFR and converted into legal obligations no longer reflect prevailing voluntary consensus standards. ANSI generally requires that standards it certifies be revisited at least every five years, and their modification through its voluntary consensus process is common. But OFR is firmly of the view, understandable

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<sup>23</sup> Mary F. Donaldson, Thirteenth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment (NISTIR 7718).

<sup>24</sup> [http://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.total\\_regulatory\\_sibr](http://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.total_regulatory_sibr)

<sup>25</sup> Government bodies are included.

in the context of American rulemaking law, that once a standard has been incorporated by reference in agency rulemaking, it can be changed only by fresh rulemaking; and OFR permits incorporation only of particular, precisely identified and existing standards, so that a rule cannot validly incorporate future revisions. Although rulemaking changes would inevitably lag a bit behind the voluntary consensus process, the costs of rulemaking and limitations on agency resources have resulted in incorporated standards being left in place as legal obligations long after they have been abandoned by their creators as voluntary standards. Thus, the majority of standards incorporated into federal regulations were incorporated before 1996 – some, even decades before.<sup>26</sup> Comments in the FDMS dockets of two recent inquiries into incorporation by reference issues identify numerous incorporated standards, still law, that are unavailable<sup>27</sup> or have subsequently been revealed to be inadequate or even dangerous.<sup>28</sup>

SDOs' copyright claims on standards do not lapse with their abandonment as voluntary consensus standards, so if a standard has been incorporated by reference its ostensible copyright endures for the life of the rule incorporating it. Circular A-119 specifically calls on agencies to respect SDO copyrights<sup>29</sup> and, indeed, the behavior of American governments in relation to incorporated standards has generally worked to preserve those claims. Rather than publishing the standards' texts in their regulations, they simply refer the readers of their regulations to the standards which they have

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<sup>26</sup> See text at n. 127 within.

<sup>27</sup> Ibid.

<sup>28</sup> See n. 125 within.

<sup>29</sup> Sec. 6(j), 63 F.R. 8546, 8555 (Feb. 19, 1998).

“incorporated by reference.” Under a regime that requires only two print copies to be kept in government depositories in Washington D.C. or its near suburbs, and makes no current provision for internet access,<sup>30</sup> the only practical course for someone in Minnesota, California, or Alabama who is affected by and wishes to learn the resulting law will usually be to purchase the standard from the SDO whose intellectual property it is, at whatever price that organization chooses to set.

### C. And Hence the Problem to Be Discussed

These facts frame the basic concern of this essay, raising a question that to lawyers might appear simply rhetorical: If standards have been made into law, don't they have to be public? Don't American citizens and companies have a right to read laws governing their conduct without having to pay the monopoly price a valid copyright would permit a private organization “owning” that legal obligation to charge for permitting access to it, on such terms as it chose to require? As the United States Copyright Office well knows,<sup>31</sup> “law is not subject to copyright.” The Information Age now makes it trivial to provide access that may have been more difficult in the age of print, and federal agencies in particular have for almost two decades been under a statutory duty to make all regulations and other matter affecting private conduct available in the electronic reading rooms they are

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<sup>30</sup> See n. 80 within.

<sup>31</sup> U.S. Copyright Office, Compendium II of Copyright Office Practices §206.01: “Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy.” And see Goldstein on Copyright §2.5.2, at 2:51: “it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less [than for standards generation].”

obliged to maintain.<sup>32</sup> All materials placed there are freely available to anyone with access to the Internet.

Yet the question is not rhetorical. If we were to impair the SDOs' markets for their standards, how would they support their undeniably beneficial work? With good reason, moreover, many SDOs will assert that those directly governed by a particular standard should find the cost of obtaining it comparable to a law school casebook's cost and – similarly – both trivial in relation to their other costs and beneficial to them in avoiding the otherwise substantial cost of personally obtaining the same information. These assertions, however, overlook two important countervailing considerations: the interests many who are not affected businesses may have in knowing what the standards are,<sup>33</sup> and the way in which conversion of a voluntary standard into a legal requirement can distort the market for that standard.

The first of these considerations may be illustrated by the recent request of a House of Representatives committee to obtain for its review a standard governing required public warnings about pipeline safety that the API had developed, and that the federal Pipeline and Hazardous Materials Safety Administration [PHMSA] had incorporated by reference into its regulations. API asked the committee to pay it \$1195 for the privilege. In PHMSA's required notice of proposed rulemaking, the Federal Register had provided to its readers only the identity of the API standard it was propos-

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<sup>32</sup> Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3049 (codified at 5 U.S.C. 552(a)(2) (2006)); see also E-Government Act of 2002, Pub. L. No. 107-347, § 207(f)(1), 116 Stat. 2899, 2918.

<sup>33</sup> Docket NARA-2012-0002-0117 (Public Agency Safety Management Ass'n).

ing to make a legal obligation – neither its text nor any supporting data or reasoning.<sup>34</sup> Once the standard had been incorporated into the PHMSA’s regulations, all the CFR told readers was that they must obey the identified API standard, which they could either inspect at the National Archives or the agency, or purchase from API. In addition to the House committee, many persons not “in the business” could have a significant interest in knowing the content of a standard that was important, and perhaps inadequate, to assuring public safety. For them, a “trivial cost of doing business” argument is unconvincing.<sup>35</sup>

The “trivial cost of doing business” argument is also challenged by settings that may require the purchase of numerous standards. Purchasing Underwriters Laboratories’ 52-page Standard UL38, “Standard for Manual Signaling Boxes for Fire Alarm Systems,” incorporated by reference in many municipal codes, costs \$502 for a hard copy (\$998 if one also wishes a three-year subscription to its future revisions, interpretations, etc.). If one were also to purchase all the other UL standards referred to in those 52 pages as elements of the standard – five of which are referred to secondarily, and an additional 27 of which are referred to in one of those secondary standards – the total cost

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<sup>34</sup> FDMS docket OMB-2012-0003-0008, p. 14 (comments of Carl Malamud for Public Resource, also available as FDMS docket NARA-2012-0002-0109). Although API eventually retracted this demand, it catalyzed the passage of Section 24 of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011, Public Law 112-90, which provides that in the future “the Secretary [of Transportation] may not issue guidance or a regulation [concerning pipeline safety] that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site.” PHMSA’s and industry’s distress over this statute occasioned a July 13, 2012 conference on the issues; until summer 2013 its files are online at <http://phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=3c76b62089ce7310VgnVCM1000001ecb7898RCRD&vgnnextchannel=d248724dd7d6c010VgnVCM10000080e8a8c0RCRD&vgnnextfmt=print> (visited August 8, 2012).

<sup>35</sup> Nor is it convincing for small businesses when these costs are considered in the aggregate. Even if the cost of particular standards is slight, the cumulative costs of the standards they must be aware of can be quite forbidding. See note 39 below.



would exceed \$10,000.<sup>36</sup>

As for market distortion and monopoly pricing, consider the electronic bookshop of the American Herbal Products Association. AHPA publishes “Herbs of Commerce,” a book setting standards “by which all plant common and scientific names will be determined on all products containing herbs.” After AHPA published the first edition of this book in 1992, the Food and Drug Administration incorporated it by reference as one element of its regulation specifying the required nomenclature for the ingredients of dietary supplements.<sup>37</sup> AHPA offers this edition on its website for \$250, on condition that it is “Available only in PDF format ... [and] may not be printed, transferred or sold.”<sup>38</sup> In 2000, it published a second edition considering 2048 different items, which its website understandably characterizes as “a must-have for anyone who writes about or manufactures herbal products.” One would think this more modern edition commercially more valuable, but the FDA has not yet incorporated *its* terms into law by reference. AHPA offers this edition for \$99.99, without stated use restrictions. Thus, it charges \$150 more for an out-of-date standard that nonethe-

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<sup>36</sup> UL sells its standards on <http://www.comm-2000.com>, which may be searched for UL38. [http://www.comm-2000.com/productdetails.aspx?sendingPageType=BigBrowser&CatalogID=Standards&ProductID=UL38\\_8\\_S\\_20080704%28ULStandards2%29](http://www.comm-2000.com/productdetails.aspx?sendingPageType=BigBrowser&CatalogID=Standards&ProductID=UL38_8_S_20080704%28ULStandards2%29) (visited November 24, 2012). Standard 746C, Standard for Polymeric Materials - Use in Electrical Equipment Evaluations, one of the five standards referenced in Standard 38, in turn references 27 unique other UL standards, whose individual prices are often hundreds of dollars higher

<sup>37</sup> 21 C.F.R. 101.4(h): “The common or usual name of ingredients of dietary supplements that are botanicals (including fungi and algae) shall be consistent with the names standardized in Herbs of Commerce, 1992 edition, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Herbal Products Association, 8484 Georgia Ave., suite 370, Silver Spring, MD 20910, 301-588-1171, FAX 301-588-1174, e-mail: [ahpa@ahpa.org](mailto:ahpa@ahpa.org), or may be examined at the Center for Food Safety and Applied Nutrition's Library, 5100 Paint Branch Pkwy., College Park, MD 20740, or at the National Archives and Records Administration (NARA).” That two physical copies may be available for inspection in the Washington D.C. or its near suburb seems unlikely to mean much to a herbalist in Minnesota, California, or Alabama.

<sup>38</sup> <http://www.ahpa.org/Default.aspx?tabid=347> (Visited August 8, 2012)

less is law, than for its “must-have for anyone who writes about or manufactures herbal products.” This is monopoly pricing of law, not copyright pricing to the market for voluntary consensus standards. It is a price utterly dependent on the fact that the outdated first edition is still law that FDA can enforce and manufacturers are therefore obligated to obey.

The API and AHPA are trade associations; UL is a not-for-profit corporation in the business of certifying the safety of electrical goods, whose standards state the conditions a good must satisfy to earn the UL certified label. Professional societies like the American Society of Mechanical Engineers (ASME) seem, in general, to charge those who purchase their standards lower prices, even though these societies are more dependent on the resulting revenues to support their standard-generating work. Yet the number of standards that a small business must know and comply with may still make purchase a substantial economic burden.<sup>39</sup> Although OMB’s Memorandum A-119 characterizes voluntary consensus standards as characterized by “provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties,” no mechanism exists for registration or oversight of royalty reasonableness – indeed for monitoring any aspect of

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<sup>39</sup> FDMS docket NARA-12-0002-0147, at 1-2 (Letter from Jerry Call, Executive Vice President, Am. Foundry Soc.) (“\$75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg ...”). Accord, NARA-12-0002-0152 (Letter from David J. Osiecki, Senior Vice President, Policy & Regulatory Affairs, Am. Trucking Ass’n), NARA-12-0002-0153 (Letter from Jess McCluer, Director of Safety and Regulatory Affairs, Nat’l Grain & Feed Ass’n), NARA-12-0002-0156 (Comments of Owner-Operator Independent Drivers Ass’n, Inc.). The burden is that much greater when one considers the desirability of purchase at the proposal stage, see NARA-12-0002-0145, at 2 (Letter from John L. Conley, President, Nat’l Tank Truck Carriers) (“One of the most challenging aspects . . . was that as published in the Advanced Notice of Proposed Rulemaking, any party wishing to comment on the petition would first have to purchase the publications in order to determine what changes would be made to existing regulations and to determine the impact of the proposal.”), or the arguable need to purchase not only the standard that has been incorporated, but its subsequent revisions. See Letter from Am. Foundry Soc., at 2.

standards' marketing once incorporation by reference has occurred. Even at the outset, no law or regulation controls the prices that may be asked, or distinguishes among the types of SDO generating a standard that happens to have been adopted into law.

The paragraphs that follow take up a series of interrelated issues and suggestions: the uncertain state of the caselaw on the copyrightability of standards that have been converted into law; the existing federal regime for regulation incorporation by reference and suggestions for its modernization; techniques for preserving the viability of copyright; and techniques for avoiding monopoly pricing of standards converted into law.

## II. THE UNCERTAIN STATE OF THE CASELAW ON THE COPYRIGHTABILITY OF STANDARDS THAT HAVE BEEN CONVERTED INTO LAW

No doubt attends the copyrightability of voluntary consensus standards as such. But when they cease to be voluntary, when all or part of a standard has been converted into legal obligation, do the words that are now law remain under copyright? One issue here is the copyrightability of law; a secondary issue would be whether, if enactment of elements of a standard as law converts them, in effect, into public property, that is a taking requiring just compensation.

The U.S. Copyright Office states forthrightly that “[e]dicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal

documents are not copyrightable for reasons of public policy.”<sup>40</sup> The proposition that public law is not subject to copyright first emerged in American law (before the age of statutes *or* the Internet) in conflicts over the reporting of judicial opinions. “[T]he court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.”<sup>41</sup> “[T]here has always been a judicial consensus ... that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute. *Nash v. Lathrop*, 142 Mass. 29, 35.”<sup>42</sup> *Nash*, the cited case, grew from the first days of national law publishing houses – Little-Brown, West Publishing, and Lawyers’ Cooperative Publishing. Beyond its emphatic reaffirmation of “the public and common right to examine and procure copies of the opinions of the justices,”<sup>43</sup> it laid the groundwork for a distinction commonly observed – that although documents constituting the law itself are not subject to copyright, still copyright protection can be obtained for compendia that include these documents along with other elements that are not, as such, the public’s property. And thus, West’s headnotes secure sale of its reporters (as, today, Lexis’ capacity to charge for access to its resources).

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<sup>40</sup> Compendium II of Copyright Office Practices §206.01 (1984).

<sup>41</sup> *Wheaton v. Peters*, 35 U.S. 591, 668 (1834).

<sup>42</sup> *Banks v. Manchester*, 128 U.S. 244, 253-4 (1888).

<sup>43</sup> At 39.

In addition to the general proposition of “law ... free for publication to all,” cases arising from the judicial opinions, rendered well before federal agency incorporation by reference of SDO standards began, relied on the fact that judges were salaried public servants. Paid by the public for their work, judges could properly claim no property in its output. The authors of legislation and regulatory outputs, too, have already been paid for their work. On the other hand, some argue, since SDOs’ *only* compensation for intellectual output comes from some combination of membership fees and copyright revenues, an agency’s choice to give mandatory status to their standards through incorporation by reference does not carry the same implication.

These arguments, however, do not distinguish between the indisputably retained right to publish one’s own intellectual work product, and the right to publish, precisely and only to that extent, such elements of those texts as have been converted into legally binding obligations. Nor have they distinguished between the elements of value created by a contemporary voluntary consensus standard, as such, and the additional value that inheres in its having been converted into a legal obligation. As in the case of “Herbs of Commerce,” the market for a standard will persist even after the standard has been modified or displaced by its sponsoring SDO as a voluntary consensus standard, if the governing law incorporating the earlier version of the standard has not changed. But now the price for the standard is a price for law, plain and simple. First editions of other law-bearing works, treatises or casebooks for example, go off the new-goods market once second editions appear; certainly (save possibly for collectibles) their value is much less. But this is not reflected in SDO pricing of displaced voluntary standards; if they are still law, their value *as law*

may even exceed the market value they had as just voluntary consensus standards.<sup>44</sup>

As Professor Lawrence Cunningham suggested in a thoughtful analysis of accounting standards,<sup>45</sup> it can be useful to address the copyrightability issue in terms of a typology. Some standards may be created precisely in the expectation that they will be adopted as law – on analogy, say, to the Uniform Commercial Code, which was drafted by private and quasi-governmental bodies, the American Law Institute and the National Conference of Commissioners on Uniform State Laws, directly for consideration and use by law-makers. Other copyrighted works may be referenced in legal obligations but themselves convey no legal obligation as such – a novel listed as a required element of English classes for public school tenth graders, or a publication placing values on used cars that state law anoints as valid in state tort actions. In between these poles lie most voluntary consensus standards that have been converted into legal obligations through incorporation by reference; they may not have been created in the expectation or hope that they would be used in this way, but their incorporation converts their terms into the very stuff of legal obligation. A dietary supplement is lawful *only* if its ingredient list conforms to the nomenclature to be found in AHPA’s incorporated first edition of “Herbs of Commerce.”

When standards are written explicitly in the contemplation of their use as law, they may themselves be copyright; an extension of copyright protection to the form in which they are in fact

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<sup>44</sup> See text at N. 37

<sup>45</sup> Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting, 104 Mich.L.Rev. 291 (2005),

made law, however, would be troublesome. Private development of the Uniform Commercial Code by the ALI and NCCUSL greatly facilitated state-by-state legislative adoptions that produced an essentially uniform national law of commerce. The UCC itself is copyright, as are materials reflecting the history of its drafting, and accompanying commentary. Yet when Minnesota adopted its terms as Minnesota law – publishing the adopted text, as amended perhaps, in its statutory collections – any claim that Minnesotans must pay ALI or NCCUSL to see the text their state had enacted would convert the law into private property.<sup>46</sup> If the standard has been designed to become law, the claim of the public to know it is strong, and the SDO is more likely to be disappointed if its work is not converted into legal obligations than surprised if it is. So too, it would seem to follow, for the SBCCI model housing code. That code would itself be copyright, giving SBCCI the exclusive right to sell it as such, in a compilation that might include any accompanying commentary. But if a Texas town accepted the implicit invitation to convert its terms, perhaps changed in a few particulars, into the set of local ordinances governing home construction in its jurisdiction, mightn't those ordinances be published as the law of that town, without violating SBCCI's copyright?

This was the question presented in *Veck v. SBCCI*,<sup>47</sup> a judgment of the Fifth Circuit sitting *en banc* that is the strongest recent voicing of the principle that law is not subject to copyright. While SBCCI had a valid copyright in its model code, conferring on it exclusive rights to sell that code as

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<sup>46</sup> Whether the ALI and/or NCCUSL could demand payment from Minnesota for its “taking” of their property is a formal question, and takings issues are to some extent considered within. The very nature of their enterprise, however, suggests its answer.

<sup>47</sup> *Veck v. SBCCI*, 293 F.3d 791 (5th Cir. 2002) (*en banc*).

such; what the Fifth Circuit held it could not prevent the publication online of what had been adopted as the law of the jurisdiction that adopted it. “[T]he law,’ whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright.”<sup>48</sup> The court rejected the proposition that this idea depended on the salaries paid to public authors of opinions, laws, and regulations. “[T]he ‘authorship’ question ignores the democratic process. ... In performing their function [by choosing a voluntary consensus standard], the lawmakers represent the public will, and the public are the final ‘authors’ of the law.”<sup>49</sup> Yet, the *Veeck* court reasoned, SBCCI’s copyright in its *model code* was indisputable, and no one could print it, *as such*, without a license from SBCCI. What governed the case was that Veeck had copied only “the law” of two Texas towns. “The basic proposition was stated by [the first] Justice Harlan, writing for the Sixth Circuit: ‘any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book.’”<sup>50</sup>

The “model code” character of SBCCI’s carries with it considerations one might think particularly supportive of a denial of copyright protection for whole sets of standards that, as in *Veeck*, are converted into law by some particular jurisdiction. First, code developers who seek incorporation, like ALI and NCCUSL or the developers of model building codes, face no difficulty in preserving the market value of their product. It may include explanatory materials, examples, and other matter that will *not* be enacted; it will be presented in a format that is relatively cheap to buy and easy to

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<sup>48</sup> At 796.

<sup>49</sup> At 799.

<sup>50</sup> At 800, quoting *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898).



carry about for reference. For such a document, rather than destroying a market, a requirement that what has been enacted must be public could be expected to enhance the value of the SDO's product, enlarging if not in fact creating the market for it. Incorporation would also confer satisfying prestige on the SDO (likely a substantial motivation for creation in the first place), adding to the value of its other works. These offsetting benefits<sup>51</sup> make it unlikely that incorporation will have diminished the value of the SDO's property.

Second, the motivation specifically to create a work to be given the force of law suggests that recognizing copyright carries considerable risks of exploitation not of the intellectual merits of the work, as such, but of the necessities created by its status as law. If it did not anticipate sufficient reward from the satisfaction and prestige accompanying having the merits of its work thus recognized, or from the possibilities incorporation would open up of commercial exploitation of supplementary (but non-essential) instructive or explanatory materials, an SDO could require an adopting jurisdiction to pay it up front for its efforts – that is, it could contract for the work of producing it.

*Practice Management Info. Corp. v. American Medical Ass'n*,<sup>52</sup> extensively discussed in *Veeck*, seems at first to be in tension with it but rather, as *Veeck* recognizes,<sup>53</sup> reflects this economic reality. The AMA had developed and copyrighted a comprehensive coding system for physicians to use in reporting their services and medical procedures. In return for a promise to use no other system, it

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<sup>51</sup> *United States v. Miller*, 317 U.S. 369 (1943). And see Goldstein on Copyright §2.5.2, at 2:51: “it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less [than for standards generation].”

<sup>52</sup> 121 F.3d 516 (9th Cir. 1997).

<sup>53</sup> 293 F.3d at 804.

granted the federal Health Care Financing Administration a “non-exclusive, royalty-free and irrevocable” license.<sup>54</sup> This license was free of any restrictions on the government’s right to reproduce or distribute the codes, but reserved copyright in relation to possible private competitors. HCFA then developed the Health Care Common Procedure Coding System [HCPCS] as a mandatory common procedure coding system for physicians’ use on Medicare and Medicaid claims; it included *both* the copyrighted AMA Code *and* additional codes HCFA had itself developed. After the AMA denied PMI a volume discount for purchase of its code (that is, *not* the HCPCS), PMI sought a declaratory judgment that AMA’s copyright was invalid, intending to publish the AMA code in an alternative, perhaps cheaper form than AMA itself sold.<sup>55</sup> While the court rejected that claim, adopting the limited “judges are paid for their work” understanding of the earlier Supreme Court cases,<sup>56</sup> it had no occasion to rule on PMI’s right to publish the federal standard *as such* – that is, the HCPCS including its non-AMA codes. Just as Veeck could not properly have published the SBCCI model building code as such – but was within his rights publishing the uncopyrightable building codes of two Texas towns – PMI could not publish, as such, the copyrighted AMA coding system.<sup>57</sup> In the end, in fact, PMI prevailed, on the ground that in extracting HCFA’s promise to use no other coding system, the AMA had abused its copyright.<sup>58</sup>

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<sup>54</sup> 121 F. 3d at 517

<sup>55</sup> At 518.

<sup>56</sup> *Ibid.*

<sup>57</sup> Consider, in this respect, the Delaware State Fire Prevention Commission’s recent adoption of the 2011 National Electric Code as law for Delaware, but with two amendments it itself made, and permission granted to localities to adopt improving (and not inconsistent) amendments. <http://www.nema.org/Technical/Code-Alerts/Pages/05-December---Delaware.aspx>.

<sup>58</sup> 121 F.2d at 521.

Another case discussed and distinguished in *Veeck, CCC Info. Services v. Maclean Hunter Market Reports, Inc.*,<sup>59</sup> falls at Professor Cunningham's other pole – both because the alleged copyright violator had sought to republish the copyrighted work as such, and because the law's reference to that work had not had the effect of converting it itself into a legal obligation. A New York statute required insurance companies to include "The Red Book" as one of several privately prepared and copyrighted lists of projected automobile values when they were determining payments for the loss of a vehicle. CCC Information Services simply appropriated parts of The Red Book for its customers. Unprepared "to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright,"<sup>60</sup> the Second Circuit equated CCC's claim with the proposition that novels would lose copyright once assigned as part of a mandatory school curriculum. "If a statute refers to the Red Book or to specific school books," the *Veeck* court wrote,

the law requires citizens to consult or use a copyrighted work in the process of fulfilling their obligations. The copyrighted works do not "become law" merely because a statute refers to them. See 1 GOLDSTEIN COPYRIGHT, § 2.49 at n. 45.2 (noting that CCC and Practice Management "involved compilations of data that had received governmental approval, not content that had been enacted into positive law"). Equally important, the referenced works or standards in CCC and Practice Management were created by private groups for reasons other than incorporation into law. To the extent incentives are relevant to the existence of copyright protection, the authors in these cases deserve incentives. And neither CCC nor AMA solicited incorporation of their standards by legislators or regulators. In the case of a model code, on the other hand, the text of the model serves no other purpose than to become law. SBCCI operates with the sole motive and purpose of creating codes that will become obligatory in law.<sup>61</sup>

Neither *Veeck* nor cases like *CCH Information Services* directly control the setting in which a

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<sup>59</sup> 44 F.3d 61 (2nd Cir. 1994).

<sup>60</sup> At 74.

<sup>61</sup> At 804-05.

voluntary consensus standard has, through incorporation by reference, become law, itself binding on citizens. On the one hand, it *is* law in the strong sense that underlies the belief that citizens are entitled to unconstrained access to the standards that govern their conduct at the risk of possible penalty for violation. On the other, the authors of voluntary consensus standards generated to that end – that is, *not* for the “motive and purpose of creating codes that will become obligatory in law” – deserve incentives to support their socially valuable conduct. On the one hand, the creation of a voluntary consensus standard can be valued by a market; it may be in competition with other standards bearing on similar issues, and the price it can command may be a function of its intrinsic worth to its purchasers. On the other hand, if it is converted into a legal obligation, not only may the price it can command may be artificially inflated by that fact, as in the case of the AHPA’s “Herbs of Commerce (1<sup>st</sup> ed.),<sup>62</sup> but the public’s stake in knowing what standard has been proposed and on what basis, and having the chance to participate in its consideration, is greatly heightened. This is Professor Cunningham’s difficult middle ground.

Are there means, then, to avoid undermining the financial viability of SDOs, as they fear simple rejection of copyright in their incorporated standards would do, while facilitating citizen access to binding legal obligations and controlling against the possibility of monopoly pricing of law? Before turning to this ultimate question, it will be useful to set forth the current statutory and regulatory regimes affecting incorporation by reference and proposals that have been made for altering them.

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<sup>62</sup> N. 15 above.

### III. FEDERAL REGULATION OF INCORPORATION BY REFERENCE

#### A. The Office of the Federal Register

As earlier shown,<sup>63</sup> 5 U.S.C. §552(a)(1) specifically authorizes incorporation by reference of materials that the Director of the Office of the Federal Register finds to be “reasonably available to the class of persons affected thereby.” When Section 552(a) was enacted, both the Federal Register and the Code of Federal Regulations – like the law generally – were exclusively print documents. Permitting the incorporation by reference in them of bulky, numerous standards protected their size, and it was primarily for that reason that incorporation by reference of material that might state binding legal obligations was permitted. Section 552(a) requires the Director to determine for each standard he approves for incorporation by reference, case by case, that it is “reasonably available.” Congress would have had reason to believe that, by virtue of office, the Director would be institutionally committed to public awareness of law. And those supporting the measure acknowledged the public’s need to know the law. Its legislative history seems to have assumed that the incorporated material would not be copyright; but that the texts of standards made law by incorporation would be published by commercial law publishers operating in the competitive market for their services – West, CCH, Prentiss Hall.<sup>64</sup> The texts just would not be published in the Federal Register or the CFR. Given these expectations, Congress’s members could have believed the law would be widely available in law libraries open to public use. Providing for “reasonable availability” thus

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<sup>63</sup> P. 7 above.

<sup>64</sup> Thus, S. Rep. No. 88-1219, at 4-5 (1964) anticipated ready availability in terms of material “publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc.”

entailed neither the need personally to pay for access to the law nor, especially, the risk of monopoly pricing.

The Office of Federal Register last adopted regulations to govern incorporation by reference in 1982, before the Information Age.<sup>65</sup> Whatever the enacting Congress might have expected, the text and administration of 1 CFR Part 51 reveal a remarkable indifference to actual public knowledge of the law. Agencies need not inform OFR of their intention to incorporate a given standard as a legal obligation until 20 working days before its submission for publication in the Federal Register as a *final* rule.<sup>66</sup> Thus, Part 51 pays no attention to the value of providing the interested public an opportunity for comment on proposed regulations, when they are to be found in material to be incorporated by reference. That is, Part 51 is indifferent to a standard's public availability, reasonable or not, at the time when it is *proposed* to be incorporated in a regulation,. Imagine that the PHMSA (or for that matter the Nuclear Regulatory Commission) were to propose a rule to deal with the problem of possible corrosion in pipes, and that its proposal said only that it proposed to incorporate by reference "A Modified Criterion for Evaluating the Remaining Strength of Corroded Pipe," a standard developed by the Pipeline Research Council Int'l. The PRC is "a community of the world's leading pipeline companies,"<sup>67</sup> and sells this standard for \$995.<sup>68</sup> One wishing to comment on such a proposal, a matter of considerable interest to anyone who might be affected by

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<sup>65</sup> 1 CFR Part 51.

<sup>66</sup> 1 CFR 51.5(a)(1)

<sup>67</sup> <http://prci.org/index.php/about/>, visited November 18, 2012.

<sup>68</sup> [http://prci.org/index.php/pm/pubs\\_localsearch/](http://prci.org/index.php/pm/pubs_localsearch/) and search by title (visited November 18, 2012).

pipe failure – not only pipeline companies, as recent catastrophes have amply demonstrated<sup>69</sup> – would be obliged to make this purchase if she wished to understand the proposal on which she had been invited to comment. If she were able to view the proposed standard, moreover, it is highly uncertain she would have access to the data, studies and discussions on which it had been based.

Having to purchase access to the proposal and the likely unavailability of its supporting materials both conflict sharply with the contemporary law of rulemaking and with the Internet developments that have made access to both proposals and supporting studies costless and immediate for all, once material is placed online.<sup>70</sup> How can one comment persuasively on a standard whose content and underlying basis are unknown? Judge Harold Leventhal asked that question four decades ago,<sup>71</sup> and judges ever since have understood rulemaking’s statutory notice requirement to also to require agencies simultaneously to release important materials on which the proposal relies. This understanding is at some tension, to be sure, with a statute worded in very general terms,<sup>72</sup> but

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<sup>69</sup> Andrew Lehren, *Millions of Miles of Pipe, and Years of Questions*, N.Y. Times, Sept. 25, 2010, at A1; *Corrosion in Pipe May Have Caused Fire*, Wash. Post, Aug. 12, 2012, at A4.

<sup>70</sup> As another example, consider the Department of Transportation’s Pipeline Hazardous Materials Safety Administration [PHMSA]’s implementation of the Pipeline Safety Improvement Act of 2002, Pub. L. 107-355 §5, 116 Stat. 2985, 2988-89, which charged it to issue standards for public education about pipeline hazards. For this task, hardly an NTTAA “performance-based or design-specific technical specification,” PHMSA turned to the American Petroleum Institute, which produced a 50+-page standard PHMSA proposed to incorporate by reference. PHMSA then did incorporate API’s standard by reference, after a public rulemaking process that was devoid of access to the proposed standard or its supporting materials. See n. 34 above.

<sup>71</sup> *Portland Cement Ass’n v. Ruckelshaus*, 486 F.32d 375, 393 (D.C. Cir. 1973) (“It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of . . . data that, critical degree, is known only to the agency.”).

<sup>72</sup> As 5 U.S.C. §553(3) describes the substance of the required notice, it is to include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” Judge Leventhal’s extension of this to scientific data and reports is perhaps best understood as a response to the changes recently worked by the 1964 Freedom of Information Act, 5 U.S.C. §552, under which such information would almost inevitably have to be supplied in  
(continued...)

it has won near-universal acceptance.<sup>73</sup> Executive Order 12,866, which since 1993 has constituted the President’s instruction to agencies how they are to conduct their more important rulemakings, embodies both this obligation *and* an obligation (also hard to connect with statutory language) actually to provide a draft of the proposed regulation, by which means a proposal to incorporate by reference can be seen.<sup>74</sup> In the computer age, a Federal Data Management Service provides the site on which all this material is to be posted, readily searchable by any interested member of the public.

At the point of *final* rulemaking, to which Part 51 is only addressed, its controls are slight. It requires the agency to provide OFR with one physical copy of the material to be incorporated,<sup>75</sup> which is then stored in the National Archives where the public might find it. It must persuade OFR

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<sup>72</sup> (...continued)

response to a request. See Peter L. Strauss, Statutes that Are Not Static: The Case of the APA, 14 J. Contemp. Leg. Issues 767 (2005).

<sup>73</sup> American Radio Relay League v. FCC, 524 F.3d 237 (D.C. Cir. 2008)(“It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity to comment.”). But see *id.* at 245-46 (Kavanaugh, J., concurring in part and dissenting in part) (“[T]he *Portland Cement* doctrine cannot be squared with the text of § 553 of the APA.”); in FDMS Docket OMB-2012-0003-0066, at 7, the Small Business Administration Office of Advocacy commented

Data and analysis that support a private technical standard used by a Federal agency should be held to the same standard [of quality, objectivity, utility and integrity, and ... i]f an agency is unable to provide reasonable access to the data and analysis or unable to resolve significant Information Quality challenges to a standard, it should not use that standard.

<sup>74</sup> Exec. Order No. 12,866, § 6(a)(3)(B), 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2006) (“For each matter . . . , the issuing agency shall provide to OIRA the text of the draft regulatory action . . . .”); *id.*, § 6(a)(E) (“After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall make available to the public the information set forth in subsections (a)(3)(B) and (C) . . . .”).

<sup>75</sup> 1 CFR 51.5(a)(2).



that the material to be incorporated is useable (a manageable print file),<sup>76</sup> a “requirement,”<sup>77</sup> and “substantially reduces the volume of material published in the Federal Register”;<sup>78</sup> and the agency must state in the regulation’s language of incorporation “where and how copies may be examined and readily obtained with maximum convenience to the user.”<sup>79</sup> In practice, however, “maximum convenience to the user” is satisfied by the presence of a one physical copy of the standard in the NARA archives, and another in the incorporating agency’s Washington-area reading room.<sup>80</sup> That the incorporated material must be a “requirement,” not an element of the statute,<sup>81</sup> entails that the material once successfully incorporated will impose legal obligations. Otherwise undefined in the regulation, OFR’s attention to “reasonably available” in Part 51 involves no consideration whatever of the price the standard’s owner may be charging for access to it, now or in future years, or the conditions being placed on that access.

Neither does OFR’s regime give any assurance about the *continued* availability of the incorporated standard, other than through the two printed copies in storage at different locations in or near

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<sup>76</sup> 1 CFR 51.7(a)(4).

<sup>77</sup> 1 C.F.R. 51.9(b)(3).

<sup>78</sup> 1 CFR 51.7(a)(3).

<sup>79</sup> 1 CFR 51.9(b)(4).

<sup>80</sup> E.g., see n. 37 above.

<sup>81</sup> The greater part of 5 U.S.C. §552(a)(1), set out at p. 7 above, requires Federal Register publication of material (e.g., “descriptions of its central and field organization”) that does not qualify as a “requirement.” Even subsection (D) requires publication not only of “substantive rules of general applicability,” but also of “statements of general policy or interpretations of general applicability formulated and adopted by the agency” – i.e., soft, not hard, law. It does not appear from the pages of the Federal Register that these obligations have been rigorously enforced – understandable enough from the perspective of protecting its volume – and in any event in the age of the Internet the right place for these documents is not on the pages of one day’s printed and imperfectly indexed Federal Register, but on agency websites where later statutes require them to be maintained and Boolean searches are generally available.

Washington, D.C. (which might in practice become quite difficult to access). Doubtless responding to concerns about delegation of lawmaking authority to private bodies, the OFR regulation is emphatic that incorporation “is limited to the edition of the publication that is approved [that is, to the edition that the agency has itself identified and decided to make legally obligatory]. Future amendments or revisions of the publication are not included.”<sup>82</sup> Because revising an incorporated standard would require a fresh round of notice and comment rulemaking, adopted standards often remain law long after the organizations that initially drafted them have updated them – as in the case of the AHPA standards discussed above.<sup>83</sup>

Thus, although creating legal obligations through incorporation by reference, under the OFR regime, saves agency resources at the *initial* stage of incorporation, it does so at the cost of making change expensive. The result, as already noted, is that although ANSI’s “Essential Requirements”<sup>84</sup> require standards organizations revisit their standards every few years, to keep them current, the

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<sup>82</sup> 1 CFR 51.1(f). State courts have rejected regulations giving legal force to future versions of standards (“Houses in this town must be built in conformity to the current standards of the Southern Building Code Congress International model building code”) as improper delegations of public authority into private hands. See, e.g., *Blitch v. City of Ocala*, 195 So. 406 (Fla. 1940) (holding that municipal ordinance requiring roofing shingles corresponding to National Board of Fire Underwriters standards would be invalid if it included future changes); *Hillman v. N. Wasco Cnty. People’s Util. Dist.*, 323 P.2d 664, 671 (Or. 1958) (finding unconstitutional adoption of national electrical code that changes from time to time); *City of Chamberlain v. R.E. Lein, Inc.*, 521 N.W.2d 130, 133 (S.D. 1994) (invalidating law that delegates to the American Institute of Architects by requiring public contracts to include provisions from an AIA standardized form); *Brookhaven Baymen’s Ass’n, Inc. v. Town of Southampton*, 926 N.Y.S.2d 594, 597 (N.Y. App. Div. 2011) (invalidating law that gave private Board of Trustees ability to change shellfish regulations in the future). It seems a different question, though, whether an incorporation by reference is permissible *only* if it is a requirement – that is, only if it carries mandatory force. See n. 77 above. “Since the 1970s, the Federal Register has refused to provide copyright protection to private standards ***unless the agency incorporates them into a formal rule in the CFR***” which greatly complicates revision. ... [T]he inability to accommodate frequent change is a particular obstacle to broader implementation of conformity assessment and complex technology standards.” FDMS Docket OMB-2012-0003-0049 and NARA-2012-0002-0118 (Comments of Scott Rafferty, former Deputy General Counsel of ACUS 4-5, emphasis in original).

<sup>83</sup> Text at n. 37 above.

<sup>84</sup> N. 5 above.

majority of standards incorporated into federal regulations were incorporated before 1996.<sup>85</sup>

The arrival of the Internet and agency electronic reading rooms has both eliminated the space-saving rationale for incorporation by reference as it has been done until now, and created new obligations of government transparency. Both developments call into particular question the financial side-effect of incorporation by reference, that people might be made to pay private organizations to obtain access to the standards governing their conduct. The electronic reading rooms have no real limits on size; they can readily hyperlink to documents maintained on other web sites; and standard search engines permit rapidly focusing on materials of interest. The Electronic Freedom of Information Act of 1996,<sup>86</sup> in requiring the creation of electronic reading rooms, brought to light and ready public access the enormous range of agency materials other than regulations that might influence their regulatory conduct. Now the effect of 5 U.S.C. 552(a)(2)<sup>87</sup> was to oblige agencies to make all their guidance materials that did *not* have to be published in the Federal Register available in their electronic reading rooms, if the agencies wished them to have any impact

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<sup>85</sup> See text at p. 44 below.

<sup>86</sup> Pub L. No. 104-231, 110 Stat 3048 (codified as amended at 18 U.S.C. § 552 (2006)).

<sup>87</sup> 5 U.S.C. §552(a)(2) provides, in relevant part,

“Each agency, in accordance with published rules, shall make available for public inspection and copying ...

“(B)those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

“(C)administrative staff manuals and instructions to staff that affect a member of the public; ...

“A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

“(i) it has been indexed and either made available or published as provided by this paragraph; or

“(ii) the party has actual and timely notice of the terms thereof.”

It is perhaps noteworthy that this section permits excision of materials only “to prevent a clearly unwarranted invasion of personal privacy” and makes no provision for incorporation by reference.

on private conduct. Strikingly, the qualities of guidance documents are just those generally associated with voluntary consensus standards. They identify means for achieving a certain result, such as one that regulations may require, without in themselves limiting the possibility of achieving that result by other means. The E-Government Act of 2002<sup>88</sup> carried this transparency impulse one step further. It not only requires the migration of rulemaking activities to the more accessible and transparent web, but also makes clear that the electronic docket it mandates for all rulemaking is to be comprehensive, containing *all* materials relevant to the rulemaking process. In consequence of these developments, today only SDO copyright claims obstruct ready public access to rulemaking proposals, to the data that supports them, and to resulting legal obligations. The strong general impulse of federal law is to require transparency of measures that will affect public obligations.<sup>89</sup>

#### B. Copyright preservation as affirmative federal policy?

##### Congress, the NTTAA, NIST and the OMB

Perhaps the strongest case to be made for the current state of affairs is that in recent years Congress has consistently relied on voluntary consensus standards as a preferred source of regulatory obligation. When in 1970 it created OSHA, Congress instructed it to adopt consensual workplace safety standards in the absence of a showing of their inadequacy; as a means quickly to

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<sup>88</sup> Pub. L. No. 107-347, 116 Stat 2899 (codified in scattered sections of 44 U.S.C. (2006)).

<sup>89</sup> One might even invoke here the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§1531-32, which set the federal government's face against regulatory measures exporting costs to others including the private sector. While no individual regulation would cross the high fiscal threshold set for invocation of the Act's mandatory terms, the collective annual cost to the private sector of having to pay private bodies for access to proposed or promulgated legal obligations created by incorporation by reference is substantial, if hard to calculate. The Act's policy impulse is clear.

establish a floor of enforceable legal obligation unlikely to prove controversial to industry (though perhaps less than optimal from a labor perspective).<sup>90</sup> When the Consumer Product Safety Commission was established in 1972, it was similarly instructed.<sup>91</sup> Then in 1995, building on an OMB Circular (A-119) first issued in the Reagan Administration,<sup>92</sup> the NTTAA generalized the proposition,<sup>93</sup> requiring a preference for both the use of voluntary consensus standards rather than self-generated rules, and agency participation, where permitted, in their generation. The statute rested on perceptions that these standards embody greater technical expertise than the government is generally able to assemble, result from more efficient processes, are more acceptable (if consensual) to the industry involved than government imposition of mandatory standards would be, and are generated without significant cost to the public. Its administration was assigned to the National Institute of Standards and Measures [NIST], an agency Congress had established in 1988 in the Department of Commerce to take over the responsibilities previously held by its National Bureau of Standards.<sup>94</sup>

None of these statutes addresses the copyright question, and the absence of attention is perhaps

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<sup>90</sup> 29 U.S.C. § 655(a) (2006).

<sup>91</sup> This history, and much else of value in understanding the history and sweep of standards development, may be found in Harm Scheffel, *The Constitution of Private Governance* 93 ff. (Hart 2005)

<sup>92</sup> See H.R. Rep. No. 104-390, at 25 (1995), reprinted in 1996 U.S.C.C.A.N. 493, 511 (“OMB Circular A-119 was originally promulgated in 1982 and revised in 1993. It requires federal agencies to adopt and use standards, developed by voluntary consensus standards bodies, and to work closely with these organizations to ensure that developed standards are consistent with agency needs.”).

<sup>93</sup> Text at p. 8 above.

<sup>94</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5111-5115, 102 Stat. 1107, 1427-1433.

especially striking in the NTTAA, which is primarily concerned with the treatment, including the financial treatment, of patents that result from shared government and private technology development. OMB's circular A-119, which in its most recent (1998) revision is an implementation of the NTTAA's limited provisions on the use of standards, does state that "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,"<sup>95</sup> and copyright protection was clearly a matter of concern to those who had participated in the notice and comment process leading to the Circular's promulgation.<sup>96</sup> Yet the discussion studiously avoids discussing just what those rights might be, and of particular interest in this regard is a comment apparently limiting the circular's intended scope to other than regulatory requirements:

"35. A few commentators inquired whether the Circular applies to "regulatory standards." In response, the final Circular distinguishes between a "technical standard," which may be referenced in a regulation, and a "regulatory standard," which establishes overall regulatory goals or outcomes. The Act and the Circular apply to the former, but not to the latter. As described in the legislative history, technical standards pertain to "products and processes, such as the size, strength, or technical performance of a product, process or material" and as such may be incorporated into a regulation. [See 142 Cong. Rec. S1080 (daily ed. February 7, 1996) (Statement of Sen. Rockefeller.)] Neither the Act nor the Circular require any agency to use private sector standards which would set regulatory standards or requirements."<sup>97</sup>

If the NTTAA and the Circular, then, do not apply to "regulatory requirements," it would appear that they do not apply to incorporations that set legal obligations, as distinct from incorporations

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<sup>95</sup> Sec. 6(j), 63 F.R. 8546, 8555 (Feb. 19, 1998).

<sup>96</sup> 63 F.R. at 8548 and 8550.

<sup>97</sup> 63 F.R. at 8549. In offering the amendment that was adopted as §12(d) of the NTTAA, Senator Rockefeller had remarked that the NTTAA was limited to "standards pertaining to products and processes, such as the size strength, or technical performance of a product, process, or material," differentiating those standards from "private sector attempts to set regulatory standards or requirements. For example, we do not intend for the Government to have to follow any attempts by private standard bodies to set specific environmental regulations." 142 Cong. Rec. S1078 (Feb. 7, 1996).

establishing permitted means by which legal obligations may be met. Preserving copyright for the latter sort of incorporation, if OFR permitted it (as it will be argued below they should),<sup>98</sup> would neither challenge the proposition that law is not subject to copyright, nor appear to confer on private parties the power to place a monopoly price on access to knowledge of one's legal obligations.

The strength of federal law in encouraging coordination between SDOs and national regulators is reflected as well in congressional limitations of the possibility of antitrust enforcement against SDOs even when, as has happened, standard-setting is used by active participants in their processes to gain commercial advantage over competitors.<sup>99</sup> The market's awareness that one boiler does, and another does not, satisfy an AMSE safety standard can drive the maker of the latter out of business – and the maker of the first may be able to secure that determination by its position in the standards development organization.<sup>100</sup> So, too, if the makers of steel conduits for electric wiring are able to exclude polyvinyl chloride (PVC) conduit as an approved type of electrical conduit in the National Electrical Code,<sup>101</sup> or if the manufacturer of new tanks for containing hazardous materials is able to cause disapproval of a new technology that, by facilitating repair of leaky tanks already in place,

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<sup>98</sup> See pp. 31 above and ? below.

<sup>99</sup> Professor Christopher Sagers has extensively considered the antitrust issues in a series of law review articles, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 *CARDOZO L. REV.* 1393, 1398-1402 (2004) ; *The Myth of "Privatization"* 59 *ADMIN. L. REV.* 37 (2007); *Standardization and Markets: Just Exactly Who Is the Government, and Why Should Antitrust Care?* 89 *ORE.L.REV.* 785 (2011). See also Wolf, *op. cit.* n. 3 above; and see n. 104 below.

<sup>100</sup> *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 559-62 (1982).

<sup>101</sup> *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-98 (1988)(noting that polyvinyl chloride conduit was rejected only after steel interests “recruited 230 persons to join the [National Fire Protection] Association and to attend the annual meeting to vote against the proposal”). The National Electric Code is a set of standards created under the aegis of the National Fire Protection Association, not itself law although its standards are often incorporated by reference in local building codes.

would cut into its market.<sup>102</sup> Should the standards in question have been converted into legal obligations through incorporation by reference, the anti-competitive impact would be all the stronger. While one might suppose the antitrust laws offered control over such behaviors, a combination of Supreme Court judgments<sup>103</sup> and congressional actions<sup>104</sup> has seriously weakened if not eliminated that possibility. Yet, like the NTTAA and Circular A-119, what these measures address are “voluntary consensus standards” creating “technical standards,” and not any legal obligations – “regulatory standards or requirements”<sup>105</sup> – that might result from the manner of their incorporation by reference.

In practice, agencies and SDOs have understood both the NTTAA and Circular A-119 to preserve SDO copyrights past the point of incorporation.<sup>106</sup> Circular A-119's instruction to “observe

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<sup>102</sup> *Sessions Tank Liners, Inc., v. Joor Manufacturing Co.*, 17 F.3d 295, 296-98 (9<sup>th</sup> Cir., 1994)(describing approval of revision of Uniform Fire Code that rejected plaintiff company's tank-lining operation after defendant company's president influenced subcommittee to reject the lining)..

<sup>103</sup> Thus, the antitrust immunity for outcomes characterized as the result of successful petitioning of government for legal change, established by *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), while somewhat modified in *Allied Tube*, n. 100 above, successfully defeated antitrust liability in *Joor*, n. 102 above.

<sup>104</sup> Reacting to FTC efforts to use antitrust laws to control SDO anti-competitive activity, the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §7, 94 Stat. 374, 376 (May 28, 1980), (codified asat 15 U.S.C. § 57a(a)(1)(B)), provides that "the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities ... "; the Standards Development Organization Advancement (SDO) Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004) (codified as amended at 15 U.S.C. §§ 4301-4305) significantly limits the antitrust exposure of SDOs that engage only in "developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment," *id.* § 4301(a)(7). The Act strongly expresses congressional approval of federal use of voluntary consensus standards, yet in doing so makes explicit reference to the provisions of the NTTAA and OMB Circular A-119 that appear to imagine their use as means to satisfy regulatory requirements rather than as the requirements themselves. See n. 97 above.

<sup>105</sup> N. 97 above.

<sup>106</sup> See, e.g., the discussion of NAESB's recently announced copyright practice at p. 53 within.



and protect the rights of the copyright holder”<sup>107</sup> might have been understood as an instruction to secure in advance an SDO’s permission to convert its privately generated standard into a public legal obligation. One can imagine bargained prices, or perhaps that this would constitute a taking that must be paid for, In either case, one suspects that the resulting prestige and the possibility of competition amongst standard-setters would keep prices down if not eliminate them.<sup>108</sup> Instead, the call for respecting copyright has been taken to permit keeping the law private and to let copyright holders charge those who must comply with it monopoly prices for knowledge of it. The fear has been that rendering the standards-made-law public would undermine the business model necessary to sustain the SDOs’ important work.<sup>109</sup> And this impulse has only been strengthened as agency budgets have shrunk (alongside, correspondingly, agency capacity to self-generate regulations or, for that matter, effectively to oversee private standard-setting). Little if any attention has been given to the impact of the Internet, and the increasing expectations about the availability of government information it has engendered, on the considerations at play. The effect, as has been widely observed,<sup>110</sup> has been to transfer wide swathes of law-making into private hands.

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<sup>107</sup> Sec. 6(j).

<sup>108</sup> See p. 20 above.

<sup>109</sup> James A. Thomas, A Business Model That Works, Standardization News, May/June 2010, available at [http://www.astm.org/PRESIDENT/mj10\\_a\\_business\\_model\\_that\\_works.html](http://www.astm.org/PRESIDENT/mj10_a_business_model_that_works.html); Am. Nat. Standards Inst., Why Voluntary Consensus Standards Incorporated by Reference into Federal Government Regulations are Copyright Protected 3 (2011), available at <http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Critical%20Issues/Copyright%20on%20Standards%20in%20Regulations/Copyright%20on%20Standards%20in%20Regulation.pdf>.

<sup>110</sup> See, e.g., Nina Mendelson, Private Control Over Access to Public Law: The Puzzling Federal Regulatory Use of Private Standards, \_\_ Mich.L.Rev \_\_ (forthcoming 2013), available at <http://ssrn.com/abstract=2264321>; Buthe & Mattli, n. 4 above, Cunningham, n. 45 above, Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543 (2000); Pamela Samuelson, Questioning Copyright in Standards, 48 B.C. L. Rev. 193 (2007); Katie M. Colendich, Note, Who Owns “The Law”? The Effect on Copyrights When Privately-Authored Works Are Adopted or Enacted by Reference into Law, 78 Wash. L. Rev. 589 (2003),.

C. Possibilities of Change – An Administrative Conference Study, Rulemaking Proposal, and  
Reconsideration of OMB Circular A-119

Incorporation by reference recently surfaced as an issue of concern in the work of the Administrative Conference of the United States. Building on extensive analysis by staff members, notably Emily Bremer,<sup>111</sup> the Conference considered and adopted a number of thoughtful recommendations on incorporation by reference practice.<sup>112</sup> However, the ACUS recommendations address themselves only to agency practice, and neither to the responsibilities of the Director nor to the sufficiency of Part 51, in the information age, to govern the question of reasonable availability.

For example, the recommendations urge agencies to address incorporation by reference issues at the stage of notice of proposed rulemaking.<sup>113</sup> They call attention to the need for proposed incorporations to be available at the rulemaking proposal stage, observing that the opportunity to comment on a proposal is illusory if one cannot know what it is that is being proposed. They take approving notice of the practice of some federal agencies, that negotiate free read-only access on standards organizations' websites during comment periods to any standards that are proposed to be

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<sup>111</sup> Emily Schleicher Bremer, *Incorporation by Reference in Federal Regulations* (2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/10/Revised-Draft-IBR-Report-10-19-11.pdf>, subsequently revised and published at *Incorporation by Reference in an Open Government Age*, 36 *Harv. J.L. & Pub. Pol.* 133 (2013); Scott Raferty, former Deputy General Counsel of ACUS, filed extensive comments in the NARA and OMB dockets, n. 82 above taking somewhat variant positions more supportive of the analysis offered in this Essay.

<sup>112</sup> Administrative Conference of the United States, *Administrative Conference Recommendation 2011-5: Incorporation by Reference* (2011), available at <http://www.acus.gov/acus-recommendations/incorporation-by-reference/> (visited December 4, 2012).

<sup>113</sup> *Id.* At 5-6.

incorporated by reference, as a means of fortifying the comment process.<sup>114</sup> But they suggest only a preference for such measures, and do not recommend that the Director of the Office of the Federal Register make their public availability during the comment period a requisite element of “reasonably available.” Similarly, while encouraging the use of standards that can be accessed without the payment of a fee, and acknowledging decisions supporting the proposition that law is not subject to copyright, the recommendations accept the possibility that the public will be required to pay copyright holders to learn the content of standards that by incorporation have been transformed into law governing their conduct.<sup>115</sup> Their acceptance of this state of affairs is grounded in the long period of usage, and in readings of the legislation and presidential guidance that fail to note their differentiation between “technical standards” and “regulatory standards or requirements.”<sup>116</sup> No consideration is given to the effect of continued copyright protection of what has become law, after it has ceased to represent a contemporary voluntary consensus standard. Thus, the ACUS recommendations remain open to the possibility that, even when the incorporation of standards by reference converts them into legal obligations, the “owner” of the standards can require the public to pay whatever license fees they might choose to charge, for access to them under whatever conditions of use and/or distribution they might choose to impose, and well past their continued relevance as “voluntary consensus standards.”

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<sup>114</sup> Id. At 3.

<sup>115</sup> Ms. Bremer’s Report does acknowledge at p.2 that “There is some ambiguity in current law regarding the current scope of copyright protection for materials incorporated into regulations, as well as the question of what uses of such materials might constitute ‘fair use’ under section 107 of the Copyright Act.” (citing *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc); *Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing “Fair Use” under Section 107 of the Copyright Act of 1976*, 23 Op. O.L.C. 87 (1999), but the resulting recommendation assumes that copyrights may be protected.

<sup>116</sup> N. 97 above.

The author, with 23 others, subsequently filed a petition for rulemaking with the OFR urging it to revise Part 51 to reflect the changes brought about by the information age, and to impose two new conditions on incorporation by reference: first, that any proposal must demonstrate that the standards had been made available without charge on commenter request during the comment period for the proposed rule; and second, that if and to the extent the proposed incorporation creates a legal obligation, the text of that obligation too must be available without charge to any member of the affected public.<sup>117</sup> The first condition reflected ACUS' advice to agencies to arrange access during the comment period, that might be restricted to commenters and protected through digital rights management; but in addressing it, sought to convert this advice into a requirement that would be consonant with contemporary law and practice. The second condition would have required public availability of any incorporated standards that had become "regulatory standards or requirements."<sup>118</sup>

The basic thrust of the petition was to urge revision of the federal practice to encourage the use of standards as guidance, identifying means of complying with regulations independently stated, rather than themselves constituting legal obligations. This, it was urged, would avoid the problem of copyrighting law, while protecting the intellectual property of organizations able to identify effective means of compliance with law. It would also solve the problem of stasis in incorporated

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<sup>117</sup> The full submission was not published in the Federal Register, but may be found in the resulting FDMS Docket NARA-2012-0002-0002.

<sup>118</sup> N. 97 above.

standards. Agencies using soft rather than hard law techniques would be free to identify new means of compliance using guidance mechanisms, without having to undertake the formalities of notice-and-comment rulemaking.

A month after the OFR published this petition in the Federal Register with an invitation for comment,<sup>119</sup> OMB's Office of Information and Regulatory Analysis [OIRA] published there an additional request for comment, in connection with its possible revision of Circular A-119.<sup>120</sup> This notice, too, raised questions about copyright protection for incorporated standards.<sup>121</sup> The resulting FDMS docket for the OFR petition<sup>122</sup> contains 162 items, and for the OIRA docket<sup>123</sup> 74, exploring a wide range of issues and perspectives. These are captured as well in the growing literature addressing the importance of privately generated standards to an increasingly global economy.

SDO comments generally invoke the necessity of financial support for their valuable work, the difficulties government agencies would face if they themselves attempted to generate standards, the expense agencies would face, in times of budgetary stringency, if they themselves had to purchase licenses broadly to publish the standards they incorporate, the federal policies encouraging the use of SDO standards and the protection of SDO intellectual property in them, and the safeguards of

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<sup>119</sup> 77 F.R. 11414 (Feb. 27, 2012).

<sup>120</sup> 77 F.R. 19357 (March 30, 2012).

<sup>121</sup> *Id.* At 19359.

<sup>122</sup> FDMS Docket NARA-2012-0002.

<sup>123</sup> FDMS Docket OMB-2012-0003/

standards-generating processes that meet the ANSI “essential requirements” – openness, lack of dominance, balance, coordination, public engagement through notice and the consideration of views and objections, and adoption by consensus.<sup>124</sup> While frequently asserting that the prices charged for standards are “reasonable,” none of the SDO comments suggests a means for regulating prices, either at the moment of incorporation or thereafter. Nor do they address the rulemaking petition’s suggestion that agencies use voluntary consensus standards not to impose regulatory requirements, but as acceptable means for achieving compliance with regulatory requirements independently stated. The SDOs apparently prefer uses of incorporation that create legal obligations (and so undergird their markets).

Although many of the comments supporting the petition were brief, emphatic statements to the effect that legal obligations must be public, a number of NGOs, consumer groups, and trade associations representing small businesses wrote in some detail. PublicResource, an organization that has been conducting a self-help campaign to place standards on the Internet, defying the SDOs to sue it for copyright violation, filed numerous comments in both dockets; in addition to strenuously insisting on the public’s need for access to the law that governs it, its comments catalogue a wide range of problems in the incorporation by reference system: that of the 9,486 incorporated standards registered by NIST, 6,194 predate 1996;<sup>125</sup> that Underwriters Laboratories today charges

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<sup>124</sup> N. 5 above. See also FDMS docket OMB-2012-0003-0024, at 7-8 (Comments from Am. Nat. Standards Inst.); FDMS docket OMB-2012-0003-0010, at 4 (Comments from Am. Soc. Of Mech. Eng’rs).

<sup>125</sup> FDMS Docket NARA-2012-0002-0043, at 11. Poster children for this problem are a Coast Guard regulation dating from 1941, 46 C.F.R. 160.041-2(b), requiring first aid kits to contain 100 tablets of phanacetin, a painkiller that is internationally recognized as a carcinogen and cause of kidney failure, and a PHMSA regulation, 49 C.F.R. 173.32(c)(4), incorporating a 1943 standard for unfired pressure vessels. Comments of Public Resource Org., FDMS (continued...)

\$849 to obtain a 1968 standard made law by OSHA in 29 CFR 1910;<sup>126</sup> that numerous still mandatory standards are unavailable for purchase; that 536 are listed in the NIST database without an associated date (a fundamental requirement); and that others simply cannot be found.<sup>127</sup> The Section of Administrative Law and Regulatory Practice extensively addressed the proposition that law is not subject to copyright.<sup>128</sup> A variety of individuals and organizations involved with information technology stressed both the success of standards generation in that field without copyright enforcement, and the undesirability of invoking the rulemaking rigidities that creation of legal norms through incorporation by reference entails.<sup>129</sup> Workers, small business entrepreneurs, and consum

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<sup>125</sup> (...continued)  
Docket NARA-2012-0002-106, p. 2.

Scott Rafferty, echoing this concern, invokes the FDA's insistence on a 1938 standard for sulfonated coal that is no longer available for purchase and was updated by ASTM in 2005. "*On average*, a standard incorporated by reference in today's [CFR] is 24 years old. ... *the benefits of consensus standard-setting are simply not consistent with the traditional cycle of formal rulemaking.*" Nine agencies, he reports, cite 32 different annual editions of the ASME Boiler & Pressure Code; "The FDA cites to four out-of-print editions of the Food Chemicals Codex (1972-1996). Yet, it does not cite any of the four editions issued in the last 16 years." N. 82 above at 2-3; emphasis in original.

<sup>126</sup> FDMS docket OMB-2012-0003-0008, p. 1. Compare text at n. 37 above.

<sup>127</sup> Id. At 10-11; NARA-2012-0002-106.

<sup>128</sup> FDMS Docket NARA-2012-0002-157.

<sup>129</sup> E.g., FDMS Docket NARA-2012-0002-0086 and -0120 (Daniel Trebbien: "In my current profession as a software developer, I have seen first hand how openness or closedness of technical standards affects the profession."); OMB-2012-0003-0041 (Information Technology Industry Council: "'Given the dynamic nature of innovation and ICT standards development, governments should be cautious about mandating adherence to any particular standard without demonstrating sufficient need and without support from the impacted industry and relevant stakeholders. ... Technical regulations can limit manufacturing flexibility, inhibit innovation, delay time to market and distort product design. They can limit market choice and slow consumer price reductions.'"); OMB-2012-0003-0042 (Business Software Alliance: "Voluntary processes have proven to be the most effective means of fueling innovation through standards, ... On the other hand, government-mandated standards in the technology industry can often result in a number of unintended consequences. These consequences may include:

- Unnecessarily freezing the development of new technologies and failing to reap fully the benefits of such quickly evolving technologies;
- Inadvertently disadvantaging certain market competitors;
- Hindering market acceptance and penetration; and

(continued...)

ers are typically missing or under-represented in standards development organizations – and especially so from the working groups and subcommittees that perform the detail work on the generation of standards.<sup>130</sup> Small business trade associations asserted both the difficulties they experienced in participating in standard-setting, and the financial burdens entailed by licensing fees<sup>131</sup>; consumer groups stated their concerns with safety issues posed by standards developed,

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<sup>129</sup> (...continued)

- Precluding a multi-faceted competitive environment. ...

Government agencies ... have a role to play, but they are most effective when facilitating voluntary processes rather than imposing rigid mandates.”)

<sup>130</sup> Cf. TAN100 above. Writing in 1978, Robert G. Dixon, Jr., *Standards Development in the Private Sector: Thoughts on Interest Representation and Procedural Fairness* 7-8 (1978), reported the deep concern expressed by Calvin J. Collier, then Chairman of the Federal Trade Commission, during hearings for the Voluntary Standards and Certification Act in 1975-1976 that the SDOs did not properly represent small businesses and consumers.

“It is of great importance that standards reflect a proper balance between the interests of all parties concerned, considering available technology. These interests are best represented when affected persons participate in the development process. Unfortunately, consumers and small businesses, for a variety of reasons, have often been unable to participate. It is understandable, then, when standards favor parties whose financial strength gave them a superior position in the process.”

Writing at about the same time, Robert Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1378 (1978):

Because [of] the ... industry orientation of most technical committees, the costs and complexity of increased safety or purity will almost certainly be weighted more heavily by these committees than by an individual whose primary concern is safety or health.... The welter of legislative enactments vesting issues of safety or health in the governmental agencies suggests that for most people the balance provided by the private sector often fails to accommodate health or safety considerations satisfactorily.

<sup>131</sup> E.g., FDMS Docket OMB-2012-0003-0026 (TenderSpec, a user, on the difficulties of securing timely notice); OMB-2012-0003-0034 (National Association of Convenience Stores; domination of Payment Card Industry Council by large electronic payment companies resulted in standards subjecting others “to an elevated risk of fraud.”); OMB-2012-0003-0058 (National Propane Gas Association; \$645 cost for accessing standards proposed to be incorporated by reference by PHMSA was “extremely excessive” for its small business membership); OMB-2012-0003-0066 (Small Business Administration Office of Advocacy; “[C]onsensus, as implemented by major SDOs, can be manipulated to achieve standards that advance a particular policy preference or create market opportunities for select providers but do not represent a consensus among regulated entities. ... [C]ommittee leadership can identify a diversity of interests that serves to dilute the voice of those parties most directly affected ... [and] small entities often lack the opportunity to challenge the result.”); NARA-2012-0002-0145 (National Tank Truck Carriers; the comments emphasize the particular problem of purchasing standards not yet incorporated in order to comment on NPRMs, and remark also that small businesses “have no option but to purchase the material at whatever price is set by the body which develops and  
(continued...)



essentially, by industries with incentives to minimize risks to save costs.<sup>132</sup>

The published literature about incorporation recognizes, in particular, the significant chance that standards will often favor the interests of established industry. Housing codes may favor rigid water piping requiring the services of plumbers over flexible piping that both is more readily used by do-

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<sup>131</sup> (...continued)

copyrights the information. ... [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a ‘dent’ was. ... HM241 could impact up to 41,366 parties and ... there is no limit on how much the bodies could charge ...”; NARA-2012-0002-0147 (American Foundry Society; “\$75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg ...”).

Particularly revealing of these problems are the comments of the National Grain & Feed Ass’n, NARA-2012-0002-0153, addressing an OSHA proposal to amend its grain handling regulation associated with fires and explosions, 29 CFR 1910.272. OSHA had issued an ANPRM suggesting that it would deal replace existing regulatory text by incorporating National Fire Protection Association Standard 61. Yet, as NGFA observed,

“NFPA standards offer a far more complex, stringent protocol that may be adopted in whole or in part by industry participants, voluntarily. These guidelines play an important role as voluntary practices that can enhance safety efforts. **But they are entirely inappropriate as a replacement for effective rulemaking** ...A review and comparison of 1910.272 and NFPA 61 reveals that there are more than 146 additional provisions addressing design, construction, and operation of affected grain handling facilities. Neither the NFPA technical committee, nor any other NFPA committee, conducts [either] an economic impact study ... [or] consider the impact of the feasibility or cost of its detailed recommendations on industry and small businesses, in particular. ... Only NFPA participants, who are required to pay to play, have the ability to comment in the development of consensus standards.”

At 2-3; emphasis in original.

<sup>132</sup> See, e.g., FDMS Docket OMB-2012-0003-0060 (Consumer Federation of America; assuring the adequacy of voluntary safety standards requires not only consensus among participants, but also adequate consumer participation, a transparent process with shared, understandable information, agency participation in the consensus process AND regulatory oversight for adequacy, such that the standard is not “wholly controlled by industry”); NARA-2012-0002-0092 (Pipeline Safety Trust, asserting that the PHMSA had incorporated by reference 85 standards privately developed by trade associations, “deliver[ing] value to members” and *not* engaging the public.) As an example, the trust invoked the API’s development of the Public Awareness standard, RP 1162, then incorporated by reference by PHMSA, and for which it attempted to charge a House Committee \$1195 for access, see p. 14 above:

“The process was controlled by industry, even though industry has no particular expertise ... [and the] many possible independent experts and organizations in the field ... were not sought and ultimately were not a part of the development of this standard.” (At 5) “[T]his is not a ‘voluntary **consensus** standard’ – this is an industry standard developed by and for industry. Nor is it a technical standard as that term was defined by Congress in the NTTAA. ... RP 1162 is a 50+ page long set of recommendations, options, considerations, and possibilities.” (At 9, emphasis in original)).

it-yourselfers and also could permit some uses to which rigid piping is not well adapted.<sup>133</sup>

... [I]ndustry representatives tend to dominate decisionmaking in many nonprofit organizations, and the standards that are produced tend to reflect the self-interest of the corporations for whom the participants work.<sup>a</sup> The lack of non-industry representatives leads private standard-setting organizations to strike a different balance between cost and protection than that favored by non-industry actors. ... [S]tandards provide limited protection for workers in many cases, because industry-dominated committees are more reluctant than OSHA to characterize a substance as a carcinogen, and less likely to rely on published scientific data instead of industry-supplied information.<sup>b 117</sup>

At this writing, neither the OFR nor OIRA has acted. Congress has adopted a statute in

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<sup>133</sup> Jody Freeman, *The Private Role in Public Governance*, 75 NYU L. Rev. 534, 641 and n. 406. (2000); compare TAN 37 above.

<sup>a</sup> See Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 124 (1993) (finding that "certain interest groups seem consistently to get their way at the expense of others" in the UCC drafting process, and that the history of Article IV demonstrates that, in particular, banks "consistently win out at the expense of their customers"); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1809, 1850-51 (1994) (finding impressionistic and empirical evidence that the private legislative bodies that drafted Article 9 of the UCC tended to favor the interests of asset-based financiers over consumer interests). See generally Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1380-83 (1978) (concluding that three groups—small business, labor, and consumers—are not adequately represented in private organizations that write nongovernmental standards affecting safety and health).

<sup>b</sup> THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* 283 (1993).

<sup>117</sup> Sidney A. Shapiro, *Outsourcing Government Regulations*, 53 Duke L. J. 389, 407-08 (2003); the two footnotes preceding this one, redesignated a and b, are elements of the quotation from Prof. Shapiro's article.

response to the API misjudgment in asking a House Committee to pay to see its pipeline safety warning standard<sup>118</sup> that has raised considerable anxiety in the SDO community, and resulted in a number of meetings to address future directions. The remainder of this essay looks at possibilities for SDOs to preserve at least the core of their business model, while permitting the public to comment on rulemaking proposals and learn about the law's obligations without having to pay what might be monopoly prices to do so.

#### IV. CAN THE PUBLIC HAVE ITS ACCESS-TO-LAW CAKE AND STANDARDS DEVELOPERS EAT REVENUE FROM STANDARDS SALES TOO?

##### A. Proposed Rulemaking and Digital Rights Management

Given the current law of rulemaking, not to mention the transformations worked by the development of Regulations.gov and its associated FDMS, agencies have strong incentives to follow ACUS's recommendation to assure commenters access to SDO standards underlying their rulemaking proposals. Few agencies would wish to take the risk that an important rulemaking would be found invalid, months if not years down the road, because they had failed to give commenters adequate notice of the content of their proposals or the studies underlying them.<sup>119</sup> For many would-be commenters, having to pay to learn the content of what is at the moment only a proposal for

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<sup>118</sup> P. 14 above..

<sup>119</sup> Text at p. 29 above.

rulemaking would be a disabling obstacle.<sup>120</sup> Yet for the SDO, having to make public what at the moment is *only* a voluntary standard, not yet a regulatory obligation, and thus unquestionably is still under copyright, could threaten income necessary for its continued success. Might temporary access under digital rights management regimes that sharply reduce if not eliminate threats of misappropriation, encouraged both by ACUS and by ANSI,<sup>121</sup> provide one means by which this dilemma might be softened?

Consider the approach taken by the North American Energy Standards Board [NAESB],<sup>122</sup> which has used a commercial program, LockLizard Safeguard Secure Viewer,<sup>123</sup> to permit requesters three days of one-time access to any standard the Federal Energy Regulatory Commission [FERC] may propose to adopt as a regulatory requirement.<sup>124</sup> The NAESB acts often in contemplation that FERC will adopt its standards as regulatory law, and its activities in support of FERC rulemaking may illustrate ways in which SDOs can then facilitate rulemaking development building

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<sup>120</sup> N. 46 above.

<sup>121</sup> Conversation with Joe Bhatia, CEO, ANSI.

<sup>122</sup> Conventional sources about the NAESB and its operations include William P. Boswell & James P. Cargas, North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization, 27 Energy L.J. 147 (2006) and FERC discussions of its use of NAESB in rulemaking statements of basis and purpose, such as Order Providing Guidance on the Formation of a Standards Development Organization for the Wholesale Electric Industry, 97 F.E.R.C. 'J 61,289 (2001), on reh'g, 99 F.E.R.C. ¶ 61,171 (2002) and Notice of Proposed Rulemaking, Standards for Business Practices of Interstate Natural Gas Pipelines, F.E.R.C. STATS. & REGS. ¶ 32,578,70 Fed. Reg. 319 (2005). Extensive conversations and correspondence with Rae McQuade, President and Chief Operating Officer of the NAESB during September and October 2012 have also added greatly to my understanding of the organization, and the paragraphs about it that follow. NAESB is relied upon as well by state utility commissions and other SDOs. Many of its roughly 3,000 standards have been incorporated by reference, and some are in use internationally. Although NAESB is an SDO credentialed by ANSI, because its standards are so likely to be incorporated by reference, few of them are made ANS standards.

<sup>123</sup> <http://www.locklizard.com/>.

<sup>124</sup> NAESB filed a detailed account of its copyright policy with the Federal Energy Regulatory Commission November 12, 2012. [http://www.naesb.org/pdf4/ferc112012\\_naesb\\_copyright.pdf](http://www.naesb.org/pdf4/ferc112012_naesb_copyright.pdf), at p. 3.

on SDO standards. A trade organization of about 300 corporate members with some regulatory members as well,<sup>125</sup> its work has become particularly important as “smart grids,” consumer choice, and the possibility that some consumers will at times be supplying power to, but at other times taking power from, electric transmission lines have become significant market realities. NAESB has a particularly tight relationship with FERC’s regulation of interstate markets in electricity and natural gas, and often initiates standards development at its request (and without seeking FERC compensation for doing so).

In line with, and perhaps exceeding in some respects, the ANSI “essential requirements,”<sup>126</sup> NAESB’s procedures for adopting standards provide at least those communities likely to be directly affected by its work opportunities for influencing it that are readily comparable to federal rulemaking procedures. It develops its working agenda on the basis of inputs from many sources, often non-members. That agenda and most materials considered in the course of standard development are readily viewed on its website. Its leadership asserted in conversation,<sup>127</sup> although its webpage<sup>128</sup> does not seem to show, that it regularly reaches out to non-member trade associations, consumer advocates, etc., and that it is possible to join distribution lists to assure active notice of developments of possible interest. When NAESB submits standards to FERC (or other public bodies) for

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<sup>125</sup> While its corporate members must pay a \$6500 annual membership fee, any state utility commission may become a member without fee, under the umbrella of a single annual \$500 payment by the National Association of Regulatory Utility Commissioners. At least California, Connecticut, Maine, New York, Ohio, Pennsylvania and Vermont have availed themselves of this possibility; the Department of Energy and NIST are also members.

<sup>126</sup> N. 5 above..

<sup>127</sup> N. 122 above.

<sup>128</sup> <http://www.naesb.org>.

possible incorporation by reference, its submission includes full documentation of the proposal's development (committee minutes, voting records, submitted comments, etc.). As distinct from the proposed standard itself, which may be purchased from NAESB or briefly accessed under digital rights management, all this material is then publicly accessible during FERC's comment period, should FERC issue a notice of proposed rulemaking that would incorporate the standard by reference. In this respect, the material available to the public tracks much of what would be available to the public commenting on a direct federal agency rulemaking proposal. An electronic filing of September 18, 2012 respecting wholesale electric quadrant standards prints out at 395 pages.<sup>129</sup>

Yet the business model NAESB has developed well illustrates the tensions that may exist between provision for open participation in standards generation and generation of the financial resources required effectively to perform one's function. Historically, non-members could freely participate and vote on NAESB committees as they worked on standards development, and sixty to seventy percent of participants on any given one topic were non-members. NAESB relied on its members' dues payments, together with sales revenues from standards, to finance its activities. Recently, however, NAESB found that some utilities and other energy corporations, on which it relied for its financial support, had become free-riders, depriving it of needed dues revenues by availing themselves of its free access policy. Thus, NAESB has recently joined the many SDOs requiring one to "pay to play" in an active sense. Non-members face charges for meeting participation by telephone or in person (\$100 for a meeting of four hours or less; \$300 for a longer one), or for a year's participation in the work of a given subcommittee (\$1000). (There is no charge for the

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<sup>129</sup> [http://www.naesb.org/pdf4/ferc\\_091812\\_weq\\_version003\\_report.pdf](http://www.naesb.org/pdf4/ferc_091812_weq_version003_report.pdf)

submission of comments, however, and any comments submitted must be considered).

Perhaps also to protect its revenue streams from free-riding, or its standards from “unintended” display in official documents that would be freely available on agency websites, NAESB has forcefully asserted its right to license (or refuse to license) their standards’ use in any agency proceeding.<sup>130</sup> In providing limited DRM access to its standards, as when they are proposed for incorporation by reference in FERC, it withholds any right to quote from those standards in comments to be filed with FERC (much less elsewhere) beyond what “fair use” permits.<sup>131</sup> Anyone who wants to reason with FERC about whether they ought to convert that standard into a regulatory obligation or whether, it having been converted, they have complied with it or it bears on some action for which they require regulatory approval, must now pay NAESB to quote its language in their filings.

The NAESB is only one participant in a standards development activity that illustrates both the importance of assuring continuing support for standards development, and its close relationship to the kinds of activities American administrative law has long committed to fully open public notice and participation. The generation and consumption of electric power has become notably more

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<sup>130</sup> N. 131 above.

<sup>131</sup> “Except under the limited circumstances specifically permitted by the Fair Use Doctrine, NAESB considers it a copyright infringement to quote any part of its standards as part of filings with the Commission. Such limited circumstances may include Commission proceedings such as complaints, rate cases, and protests to rate cases. However, parties should always consult with NAESB prior to the use of any verbatim quote of copyrighted material.” *Id.* At 5. The NAESB filing contains no mention of rulemaking, and appears to be principally concerned with quotations made in the course of compliance filings and/or tariffs – that is, filings likely to be made by organizations whose membership it hopes to attract. *Cf.* text at n. 52 above. Membership in itself confers access to standards and while that access is limited to internal use, *id.* at App. A-1, it also creates a relationship within which external uses may be bargained out.

complex as new sources dependent on variable inputs (wind farms, solar panels) and possibilities for co-generation have been added, national networks have expanded, and our awareness of potential sources of disruption – solar storms, for example – has increased. Assuring stable, reliable interoperability – what standards have long been about – has become the work of a Smart Grid Interoperability Panel [SGIP] operating under the aegis of NIST.<sup>132</sup> NIST’s recent Framework and Roadmap for Smart Grid Interoperability Standards, Release 2.0<sup>133</sup> runs 225 tightly packed pages, citing 37 already identified standards, such as a suite of ANSI standards for data collection and transmission,<sup>134</sup> and an additional 61 still under review.<sup>135</sup> In general, the standards have been developed under NIST’s requirements for transparency, open participation, and “reasonable” (but not free)<sup>136</sup> accessibility; and, importantly for the purpose of this essay, FERC appears to have accepted NIST advice that the standards are best used as “appropriate signals to the marketplace ... without mandating compliance with particular standards. NIST adds that it would be impractical and unnecessary for the Commission to adopt individual interoperability standards..”<sup>137</sup> So long as this advice is followed, the “law” problem with which this essay is concerned would not be present; however, the fees the SGIP has found necessary to charge for participation in its deliberations, as

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<sup>132</sup> “Today’s electric power grid ranks as the single greatest engineering achievement of the 20th century. And tomorrow’s Smart Grid will be one of the greatest achievements of the 21st century. By linking information technologies with the electric power grid—to provide “electricity with a brain”—the Smart Grid promises many benefits, including increased energy efficiency, reduced carbon emissions, and improved power reliability.” <http://www.nist.gov/smartgrid/>

<sup>133</sup> (Feb. 2012), available at [www.nist.gov/smartgrid/upload/NIST\\_Framework\\_Release\\_2-0\\_corr.pdf](http://www.nist.gov/smartgrid/upload/NIST_Framework_Release_2-0_corr.pdf).

<sup>134</sup> The second of the listed standards appearing at pp. 70-105 of the printout.

<sup>135</sup> *Id.*, p. 107 ff.

<sup>136</sup> It perhaps bears repeating that there appear to be neither standards nor enforcement mechanisms in place to determine what is a “reasonable” fee.

<sup>137</sup> At p. 8, quoting <http://www.ferc.gov/EventCalendar/Files/20110719143912RM11-2-000.pdf>, p. 6.



well as its impending conversion from NIST dependency into an independent NGO that must be sustained by substantial dues requirements,<sup>138</sup> well illustrate the financial imperatives present in our reliance on SDOs for standards creation.

### B. Standards Developed in the Expectation of Incorporation

Perhaps in rulemaking comments one could avoid the need to quote extensive language from the standard being proposed for incorporation. Any quotations might readily be brief enough to fit comfortably within the dimensions of “fair use.” And perhaps the temporal, one-time-only limit NAESB imposes on the free DRM access it offers to its standard – at that moment still merely a voluntary standard – should be regarded as sufficiently enabling of the comment process. Once a standard has been converted into a legal obligation, however, needs that the regulated and regulatory beneficiaries may have for access to its terms are permanent, not time-limited, and may be frequent. Even more striking, NAESB says it is prepared to enforce the proposition that its language may not be quoted even in documents submitted to the regulator whose law it is, without a license from it at the price it chooses to charge.<sup>139</sup> While its members have free access to its standards, they have it only for their internal use. The standards are not to be shared with others.

Perhaps NAESB’s concern is again with free-riding – that publication of its standards in public pleadings, or even the possibility of repeated access to them, might create a purchase substitute for

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<sup>138</sup> <https://collaborate.nist.gov/twiki-sgrid/bin/view/SmartGrid/July2012McDonaldLetter>.

<sup>139</sup> P. 53 above.

those who could otherwise be steady customers. The concerns seem overdrawn. Neither participants before FERC nor FERC itself will be likely to have any need to quote standards *in extenso* in proceedings in which they may be at issue, as compared to those aspects of them important to the case at hand. The doctrine of “fair use” seems well suited to situations in which quotation might reasonably be thought compelled. And the use of digital rights management for controlled access, at any time when access is needed, seems the modern equivalent of the law-library access Congress imagined in requiring a finding of reasonable availability when it enacted §552(a)(1).<sup>140</sup>

At root of the issue here may be the nature of NAESB’s close relationship with FERC. If it is not quite the SBCCI, nonetheless it is developing its standards, not as voluntary standards under the primary hope that they may prove persuasive in market operations, but precisely in the contemplation that they will be a useful product for FERC to incorporate into legal obligations. Perhaps driven by budgetary considerations or by the statutory preference for voluntary standards embodied in the NTTAA, FERC in effect has asked NAESB to develop standards that it might have formulated through rulemaking of its own. Similarly, it appears, PHMSA relied on API to generate its public pipeline safety hazard warning standards.<sup>141</sup> Neither the NAESB nor the API standards are “technical” standards in NTTAA terms, and self-evidently they are standards in which the public as well as the members of NAESB or API would have a considerable interest. It should be quickly apparent that the outsourcing is essentially contractual, making the opportunity to bargain for price, and the reasons for doing so, strong. If NAESB or API thought it needed compensation for the

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<sup>140</sup> See text at n. ? above.

<sup>141</sup> See text at n. 34 above.

work an agency was effectively delegating to it, that could have been agreed upon at the outset – with the result that the work-product, as law, would then have been public.<sup>142</sup> And if this were a public contracting process with, say, a “request for proposal” [RFP] process, it is at least possible that a less “interested” applicant would appear. The prospect of competition to provide this service for the agency would be real (as would be the possibility that the agency would decide that self-production would be preferable) and any opportunity for monopoly pricing of law would have been eliminated.

Effectively outsourcing rulemaking not only suggests a level of trust in the disinterestedness of the standard-setter that not all persons affected by its standards might find warranted, but it also has the potential of defeating many of the procedural safeguards of federal notice-and-comment rulemaking, hiding from public (and agency) view the data, formative private inputs and even reasoning that FDMS dockets reveal to all.<sup>143</sup> Negotiating in advance the terms of what is in effect contracted-out rulemaking would permit the rulemaking agency to specify the procedures by which the desired standards will be generated: what and how notice will be given; whether persons wishing to participate can be required to “pay to play,” as is often SDO practice; lodging the full records of the standards-generation process with the rulemaking agency as a public record that will be available during the agency’s own notice-and-comment process; the nature of explanations the SDO

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<sup>142</sup> One might also believe that PHMSA, in entering into such an agreement, should also be insisting upon API’s achieving the levels of openness about data relied upon, views submitted, and reasoning to which it itself would be held in notice-and-comment rulemaking – considerably more, as has been suggested, than ANSI’s Essential Requirements entail – but that is an argument for another day.

<sup>143</sup> Cf. Judith Resnik, *Globalization(s), privatization(s), constitutionalization and statization: Icons and experiences of sovereignty in the 21<sup>st</sup> century*, 11 *Int. J. Const. L.* 162 (Oxford 2013).

should give for controverted policy choices made; etc. NAESB's procedures may have met some of these standards; about API there is more room for doubt. Without such measures, an agency's reduction of the cost of conducting its own subsequent rulemaking, can have the consequence of considerably reducing the visibility of and the public's access to the standards-generation process.

Moreover, NAESB's approach post-adoption, when its standards have been converted into legal obligation, is questionably justified for an SDO that has created its standards in coordination with an agency and in expectation of their incorporation. Here, *Veck*<sup>144</sup> has its clearest application, as does Professor Cunningham's persuasive typology.<sup>145</sup> Unhindered digital right management access to incorporated standards might, in this context, be seen as an acceptable middle ground, preserving the print market likely to be used by those having to consult the standards as a whole and with regularity. And it marks an approach under active consideration in the SDO community. The National Fire Protection Association permits access to all of its incorporated standards under digital rights management at any time, without charge.<sup>146</sup> Its codes as a whole, rendered in portable form, are what have sustaining value in the market – and of course their incorporation as legal obligations significantly arms that market.<sup>147</sup> ANSI, at this writing, is actively exploring with its member

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<sup>144</sup> TAN. 47 above

<sup>145</sup> TAN 45 above and pp. following.

<sup>146</sup> James M. Shannon, President's Report (2012) ("More than ten years ago we put all of our codes and standards on our website and made them available to anyone who wants to review them. On our RealRead site the standards cannot be downloaded or printed but anyone can read all of our codes and standards online without paying a fee. We were the first standards developing organization to do that." Available at <http://www.nfpa.org/itemDetail.asp?categoryID=2218&itemID=51934&URL=Training/Conferences/NFPA%20Conference%20&%20Expo/General%20Session/> (Visited December 26, 2012).

<sup>147</sup> That portable form, NFPA realizes, increasingly must be digital, and its business model is being changed to  
(continued...)

ship the possibility of establishing a central DRM database for accessing incorporated standards; perhaps the Office of the Federal register and/or the Small Business Administration will be persuaded to join in the enterprise.<sup>148</sup>

### C. Standards Developed Independently of Any Expectation of Their Incorporation

The preceding paragraphs have largely concerned standards created in direct contemplation of their immediate use by government bodies. Matters are somewhat different for voluntary consensus standards that have been created without expectation of their possible incorporation as legal obligations – particularly in cases in which the agency wishes/needs to incorporate only a part of the standard. Unlike SBCCI or API, ASME would in some sense be surprised by the conversion of all or part of one of its voluntary standards into a legal obligation. In the commercial use context for which it was created, its copyright is entirely unexceptional, and its market initially depends on the standard’s utility, not on compulsions that may have been created by its (perhaps surprising) conversion into a legal obligation. On this assumption, there could have been no bargained price, no prior contractual arrangement to develop the standard; and the price initially set for the standard

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<sup>147</sup> (...continued)

reflect the realities of the information age – including the questions now being raised about the copyright protection available for standards that have been converted into law. “Content Strategy,” available at <http://www.nfpa.org/itemdetail.asp?categoryid=2436&itemid=55491&url=about%20nfpa/content%20strategy> (visited December 25, 2012). (“We have had great success over the years using a business model in which the principal source of revenue was the sale of print editions of our codes and standards. That business model is no longer sustainable.”) On September 12, 2012 it announced that it was converting the terms of electronic sales of its standards into a “social” digital rights form making purchased standards usable on all of a purchaser’s digital equipment; they will now be sold with an embedded watermark identifying the purchaser. [http://www.nfpa.org/newsReleaseDetails.asp?categoryid=488&itemId=58616&cookie\\_test=1](http://www.nfpa.org/newsReleaseDetails.asp?categoryid=488&itemId=58616&cookie_test=1) (Visited December 25, 2012).

<sup>148</sup> Conversation with Joe Bhatia, CEO of ANSI, December 11, 2012.

is likely market driven, not a function of any need to know the law governing one's conduct. If incorporation by reference served to lift the copyright and thus damage the market for the standard, that unexpected conversion would appear to be a taking that – as with all governmental expropriations of private property – should be properly compensated. One might think, too, that requiring the government to assess in advance the value of what it would be taking, rather than leaving that value to be reaped from others on the subsequent market for knowledge of the law, had the potential to control the most problematic characteristic of private standard-setting, the appearance that public power has been placed in private hands. When agencies discover useful standards, rather than seek their creation, this concern is subdued.

It is worth emphasizing, however, that a “takings” rationale would not take one so far as to permit the prior owners to charge members of the public to know the law. When the government takes private property for use as a public park there is a single payment for the property taken; not a retained right to charge anyone who might subsequently want to use the park such admission fee as the prior owner cared to set. The argument for this perspective on incorporated standards is the stronger, considering that no one is compelled to use a park that the government has chosen to create, whether by expropriation or not. Like the fees charged for obtaining those standards that remain voluntary, park fees are controlled by the possibility of substitutions in the market. Substitutions are not possible for standards that have been converted into legal obligations. Moreover, if incorporation by reference preserves copyright in what previously was just a voluntary standard, that creates for the SDO an exclusive market for publication that might otherwise have been served by

one of its competitors;<sup>149</sup> this anti-competitive impact, not merely a private organization's unusual power to set monopoly prices for learning the law, further undercuts copyright-preserving alternatives.

The "takings" possibility, then, warrants some attention. The standard argument of the SDOs, and a concern of government agencies, is that this would be unacceptably expensive for the agencies. In effect, the income stream from sale of incorporated standards is taken as a substitute for direct payment of "just compensation." It seems problematic, however, to transform the prospective price for a taking (unmistakably a governmental obligation that may be judicially fixed if agreement on it cannot be reached) into a price unilaterally set by monopolists on private parties with little choice about purchase. Congress has in other contexts set its face against "unfunded mandates,"<sup>150</sup> and that concern seems equally applicable here. Nor is it clear that agencies would in fact be obliged to pay high prices for their use of SDO standards if a takings analysis were in place.

The agency can control if not entirely eliminate that value if it incorporates only those elements of a standard that it finds regulation to require, and not the whole of the SDO's work-product. As already noted, voluntary consensus standards often go into much more detail that would be necessary, or even appropriate, to require by regulation. If an agency incorporates by reference only the

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<sup>149</sup> N. 10 above.

<sup>150</sup> Unfunded Mandate Reform Act

definition of a “dent” from complex standards on tank truck safety,<sup>151</sup> making that definition public – the only publication that would be required – could hardly diminish the commercial value of the standards as a whole. Whether or not conceptualized as fair use, such care to incorporate no more of a set of standards than an agency’s needs entail might thus control the takings question. A database to which access was free, but under digital rights management control, would meet the statutory test of reasonable availability in the computer age, and seem likely to reinforce, not undercut, the value of the full standard in print.

Moreover, the SDOs’ important and legitimate claims to finance their operations through sale of their “voluntary consensus standards” are time-limited in a way that arguments for continuous government protection of their intellectual property rights do not respect. ANSI’s Essential Requirements include frequent reassessment of any voluntary consensus standards it accredits – in general, no less frequently than every five years.<sup>152</sup> Since it will take some time for an accredited voluntary standard to be transformed into a legal obligation, one can have some confidence that the price initially asked for the standard will be a market price. It is a voluntary standard; there are at best market compulsions to purchase it. Since it takes time to incorporate it by reference, when that happens only two or three years may be left before it is replaced as a voluntary consensus standard by a revised version. That revised version is now the voluntary consensus standard, and that is the standard whose price will in some sense be dictated by the market for such standards. Any claim of right to compensation for the loss of sales of superannuated standards that an SDO has in fact

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<sup>151</sup> Note 131 above.

<sup>152</sup> ANSI Requirements §4.7.1



changed on its own books seems outside a business model premised on sales of voluntary standards. Independent of its conversion into law by incorporation, a standard's commercial value will have been eliminated, or at the very least greatly reduced, by its revision. Any price an SDO might be able to charge for access to that displaced standard would owe its value just to the standard's transformation into law and not to its copyright as such.<sup>153</sup> And the great majority of standards that remain legal requirements today is more than fifteen years old.<sup>154</sup>

One of the ways, then, that SDOs might protect their appropriate business model – that is, their reliance on sales into the market for voluntary consensus standards – would be simply to abandon claims that superannuated standards may not be made public. If the claim for the right to sell access to the standard were limited to the period between its adoption as a voluntary consensus standard and its revision, one could have some confidence that the price charged would be that for a standard, and not for law. One would not encounter situations like that presented by the American Herbal Products Association, selling the contemporary version of its standards as a copyable and transferable physical book for 40% of the price it charges for the older, but incorporated, standards that is sells under tightly restrictive digital rights management.<sup>155</sup> Correspondingly, whatever an agency's reluctance might be to place in its electronic reading room the text of a contemporary standard it had recently incorporated by reference, it could with confidence place that text there once the voluntary standard, but not yet its own regulation, had been revised.

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<sup>153</sup> TAN 37 above.

<sup>154</sup> See n. 125 above.

<sup>155</sup> TAN 37 above.

#### D. Must Incorporation by Reference Create Legal Obligations?

Part 51, the OFR regulations on incorporation by reference, currently insists that incorporation is proper *only* if it entails a legal obligation and, doubtless for this reason, goes on to provide that future revisions of the incorporated standard cannot be referred to.<sup>156</sup> This restriction, which has not always been an element of OFR’s administration of 5 U.S.C. §552(a)(1),<sup>157</sup> bears much of the responsibility for the failure of incorporated standards to keep up with voluntary consensus standards. Rulemaking requires resources that agencies have in short supply; changing an incorporated standard is expensive. But the OFR position is not required by the APA’s text, and runs contrary to the expectation under the NTTAA that standards will be “technical” and not “regulatory standards or requirements.”<sup>158</sup> One readily imagines rules that directly state regulatory requirements and invoke standards as illustrative but not required means of compliance, permitting agencies to use guidance documents at lower procedural cost, and without creating law, to identify alternative means of compliance as standards evolve. Such an approach would appear to be better both for SDOs – their copyrights are not threatened when their standards are not converted into legal obligations – and for agencies acquiring flexibility for change.

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<sup>156</sup> See TAN 82 above.

<sup>157</sup> Emily Bremer, whose research and report underlay the ACUS recommendations, n. 111 above, discovered in interviews with career rulewriters who have worked on incorporations by reference for decades that the limitation to technical material was once more rigidly enforced. Email to author, December 14, 2012. Scott Rafferty, who worked at ACUS while her report was under development, made a similar observation in his comments to the OMB docket, n. 32 above.

<sup>158</sup> P. 36 above.

Consider, in this regard, 29 C.F.R. 1926.200(c), an element of OSHA's safety and health regulations for construction.<sup>159</sup>

**(c) Caution signs.** (1) Caution signs (see Figure G-2) shall be used only to warn against potential hazards or to caution against unsafe practices.

(2) Caution signs shall have yellow as the predominating color; black upper panel and borders: yellow lettering of "caution" on the black panel; and the lower yellow panel for additional sign wording. Black lettering shall be used for additional wording.

(3) Standard color of the background shall be yellow; and the panel, black with yellow letters. Any letters used against the yellow background shall be black. The colors shall be those of opaque glossy samples as specified in Table 1 of American National Standard Z53.1-1967.<sup>160</sup>

This regulation states a mandatory standard, putting a caution sign using some other colors than those of "opaque glossy samples as specified in Table 1 of American National Standard Z53.1-1967" in violation, however minor, and exposing the company posting it to sanctions, however

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<sup>159</sup> Part 1926 runs 695 pages in the print version of the latest Code of Federal Regulations – but that dimension seriously understates its effective volume. In them, one regularly encounters formulas like 200(c).

<sup>160</sup> 29 CFR 1926.200(c)

slight. Adopted in 1967, Standard Z53.1-1967 is now defunct, having apparently been displaced by ANSI standard Z535 SET; it cannot be found in ANSI's electronic library of standards. Yet, because it remains under copyright, one would have to pay ANSI to obtain access to it, if it could be found in print form. And if OSHA wished to bring its regulation up to date, incorporating ANSI standard Z535 SET, it would have to go to the trouble (and expense) of convening notice-and-comment rulemaking proceedings to do so.<sup>161</sup> As an alternative, imagine a regulation taking this form:

**(c) Caution signs.** (1) Caution signs (see Figure G-2) shall be used only to warn against potential hazards or to caution against unsafe practices.

(2) Caution signs shall have yellow as the predominating color; black upper panel and borders: yellow lettering of "caution" on the black panel; and the lower yellow panel for additional sign wording. Black lettering shall be used for additional wording.

(3) Standard color of the background shall be opaque glossy yellow; and the panel, opaque glossy black with opaque glossy yellow letters. Any letters used against the

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<sup>161</sup> Note in this respect that Z535 SET is a complex collection of six different collections of standards, <http://www.nema.org/Standards/z535/Pages/ANSI-Z535-Brief-Description-of-all-Six-Standards-and-Safety-Color-Chart.aspx>, revised every five years, that both ANSI and the National Electrical Manufacturers Association, the responsible SDO, offer for sale on their websites for \$518. (The associated color chart can be purchased separately for \$36.) A September 2012 NEMA publication discusses in some detail marketing strategies and a continuing effort to get OSHA to update its 1968 standard. NEMA Standards Strategic Marketing Plan (Sept. 18, 2012), available at [http://workspaces.nema.org/public/temp/Shared%20Documents/Z535%20Business%20Plan\\_2013\\_Final.pdf](http://workspaces.nema.org/public/temp/Shared%20Documents/Z535%20Business%20Plan_2013_Final.pdf).

yellow background shall be opaque glossy black.

(4) Compliance with this regulation may be assured by the use of opaque glossy yellow and opaque glossy black colors as defined by ANSI standard Z535 SET, or such other standards as may be listed from time to time as “compliance standards” in OSHA’s electronic reading room.

Subsection (4) identifies one safe harbor and permits OSHA readily to identify others; because it does not convert ANSI standard Z535 SET into a legal obligation, it does not threaten ANSI’s copyright. Indeed, writing the regulation in this way would, quite desirably, preserve possible competition among SDOs, protect SDO copyright revenues (subject to market competition in standards), and avoid any need for further rulemaking. OSHA’s list would constitute a form of guidance; and by itself making the listing determination, any issue of delegation of law-making into private hands would be avoided.

Indeed, the distinction between legal requirements and standards identifying means of compliance characterizes other systems that have faced these issues. The British Standards Institute, for example, presents the 27,000 standards it offers for sale on its website as “designed for voluntary use and do not impose any regulations, by law.”<sup>162</sup> In comments to the OMB Federal Register

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<sup>162</sup> <http://www.bsigroup.com/en/Standards-and-Publications/About-standards/How-are-standards-used/> (last visited 4/5/2012).

notice<sup>163</sup> it associated this approach with one generally followed in Europe, strongly supporting a distinction between “mandatory Regulations and the voluntary standards that provide a useful but non-exclusive, means of compliance with them ... essential requirements and voluntary means of compliance.”<sup>164</sup> The use of standards *as law* is simply refused and privately developed standards are instead identified as means for compliance with separately stated regulatory obligations. European courts regularly refuse the status of law to standards generated by private organizations, as inconsistent with democratic principles. The “New Approach” of the European Union uses law (Directives) to establish the essential requirements that European products must meet to be marketable in its single market; one can then demonstrate compliance with those requirements independently, *or* by showing the satisfaction of standards developed by European or national standards organizations to identify complying products. And the adequacy of those standards to meet the “essential requirements” is itself open to question. They are not, in themselves, legally binding, but rather have a force similar to that of “guidance” in American administrative practice. In such a context, the issue

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<sup>163</sup> FDMS docket OMB-2012-0003-0063.

<sup>164</sup> (Id. at 1) “Compliance with a ‘harmonized standard’ gives a presumption of compliance with some or all of the essential requirements of a Directive but anybody is free to choose alternative routes to demonstrating compliance.” Standards are created “through a process that will have involved industry, consumers and government representatives, and all standards are submitted to a period of open public enquiry during which any person may submit a comment.” (At 2) This approach is desirable in focusing regulators on identifying the essential needs, yet not freezing the means of getting there – thus both reducing their need for technical expertise, and permitting ready change with developing technology. “Because standards referenced in regulations are not mandatory they are not official documents and their ownership (including copyright) usually rests with private standards organizations.” (At 3)

The BSI comments also address issues of public availability, and the importance to BSI of a private status that would be compromised by law-creation. BSI places its standards with educational institutions and libraries on favorable terms, permitting free access by students and the public for reference purposes. BSI would strongly resist government conversion of standards into regulations, as it would then lose its independent status; and, it is not elected. Its comments assert that this is, indeed, the general European view, citing Dutch case and German law and providing a British example about baby carriages (At pp. 4-5) Better practice is for agencies to maintain website lists of standards they find to meet the requirements of their regulations (as distinct from providing that the most current standard will always suit, which would be an excessive delegation). (At p. 6)

of copyrighting “law” does not arise. One may be certain that most if not all persons faced with the need to comply with essential requirements will choose the “standards” route to satisfaction; yet as they are not compelled to do so, they are free to compare the price of that route with such alternatives as may be available to them.

A recent book, Tim Bütthe and Walter Mattli’s **The New Global Rulers: The Privatization of Regulation in the World Economy**,<sup>165</sup> explores contrasts between American and international standards practices in considerable detail. In a global economy, technical standards that differ across countries can become substantial trade barriers – the proposition that lies behind the World Trade Organization’s continuing concern with non-tariff barriers to trade.<sup>166</sup> Where in the United States standards development organizations are many – potential competitors, with only some of them under the relatively loose supervisory aegis of the American National Standards Institute<sup>167</sup> – standards organizations in other economies are typically national or, like CEN or ISO, multinational. The British Standards Institute’s tight hierarchical control over the work done by subordinate groups, CEN’s ability to set single standards for the European market, both assure national (or international) uniformity and (given its resulting political significance) result in more balanced representation in its deliberations<sup>168</sup> than ANSI can assure across the hundreds of competing

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<sup>165</sup> (Princeton 2011).

<sup>166</sup> N. 4 above

<sup>167</sup> Compare Sagers, n. 99 above, 89 Ore. L. Rev. at 795.

<sup>168</sup> “[In Europe,] most national standard bodies are subject to governmental regulation. In exchange for usually providing partial public funding, these rules require each national standards organization to have representatives from a wide range of interests on technical committees ... [including] trade unions, consumer groups, ... socioeconomic interest (continued...)”

American standards developing organizations, many of which are not within its aegis or choose on occasion not to submit their standards to its certification.<sup>169</sup>

American standards organizations repeatedly assert the superiority of the competitive, loosely organized American system, yet what it gains domestically it may lose in the international context. Bütthe and Mattli seem able to demonstrate that with the growth of Europe as a single market, the its tightly coordinated standards have often prevailed. National standards organizations speak in CEN or ISO with an authority that ANSI cannot command. And the result, they assert, is to disadvantage domestic American market participants. American multi-nationals may learn about and be in a position to influence these standards, but wholly American firms will not<sup>170</sup> – another way in

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<sup>168</sup> (...continued)

groups, ministries, and public agencies. ...In short, a standard adopted in Europe typically is the result of the involvement of representatives of a broad range of social interests ... Such broad-based involvement, however, is neither easy nor automatic because participation in standardization can be quite costly and is non-remunerative. ... Europeans therefore recognize a need for subsidies to weaker groups; such assistance is viewed as a prerequisite for genuine openness and due process. In sharp contrast, most American standards organizations contend that willingness to pay is the best measure of interest in the process and see no need for financial assistance.” Id. at 155-57.

<sup>169</sup> “Coordination and cooperation do not arise spontaneously among competing standard-setters, and ...[there is] a long tradition of keeping government at arms’ length. ... In the absence of government control or any other central monitoring and coordinating agent, the American system for product standardization is characterized by extreme pluralism and contestation. ... ANSI remains a weak institution, even though it formally is the sole representative of U.S. interests in international standards organizations. ... Private U.S. standards organizations, which derive 50 to 80 percent of their income from the sale of their proprietary standards documents ... fear that a more centralized system would rob them of these revenues and eclipse their power and autonomy.” Id. At 150-51. See also FDMS Docket OMB-2012-0003-0047 (Illinois Tool Works; reporting at 5 that an ANSI-accredited body had withheld a possibly vulnerable standard from ANSI (so the ANSI appeal process was not available) yet used their ANSI accreditation as a basis for securing its inclusion in the International Building Code. “[T]he financial benefits resulting from the sale of the standard in copyrighted materials published both by the SDO and the code body provided an undue incentive to have the standard accepted. ... ANSI has discovered that this was not an isolated incident. In fact such claims are made often enough that ANSI has devised a name for the practice: the HALO effect. To our knowledge, the conditions resulting in this phenomenon have not been reformed by ANSI.” )

<sup>170</sup> “A U.S. multinational with a subsidiary in Germany, for instance, could send its standards experts via its subsidiary to sit on DIN technical committees and therefore on CEN committees.” Bütthe and Mattli at 161. Multinationals, too, may be at risk absent adequate measures to enforce WTO and ANSI standards of good practice. (continued...)



which standards processes may serve to favor the largest market participants. Thus, they report, a 1988 EU directive on the safety of toys led to development of standards by CEN which were then accepted verbatim as ISO standards, producing “not only a de facto requirement for exporting to the European market, but also for exporting to many other international markets.”<sup>171</sup> American manufacturers lacking European subsidiaries learned about the process too late to participate in ISO consensus procedures – many, not until after the ISO vote – resulting in lost market share and/or a costly need to retool. In contrast, American firms seeking in the early 2000s to establish an ANSI/ASME standard for the optics industry as an ISO standard failed almost completely. “European manufacturers quickly learned of this proposal and realized that the changes would impose on them costs estimated at several billion euros for German industry alone”; their efforts in response resulted in an ISO standard “much closer to European preferences.” In 2009, ASME withdrew its competing standard and “U.S. optics industry organizations started to adopt the ISO standard instead.”

One might note that, to the extent the existence of competing standards and standards development organizations *is* an asset of the American system, any incorporation by reference *that carries the force of law* undermines it. If each of three competing voluntary consensus standards may satisfy a given regulatory need, market forces will tend to control price even if we assume consum-

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<sup>170</sup> (...continued)

Thus, Illinois Tool Works, a global manufacturer, told OMB that it had “experienced directly the manipulation of a U.S. standards development committee process leading to a standard created to benefit a single manufacturer and its European Union-patented product to the detriment of U.S. producers.” The participating federal employee from the agency that would convert this voluntary standard to a legal requirement was under no duty to report the objections made. FDMS Docket OMB 2012-0003-0047 at 2.

<sup>171</sup> Bütthe and Mattli, n. 4 above, at 162.

ers will feel driven to purchase one or another of the three. If one of the competing standards developers is able to secure the incorporation of its standard *as law*, the result is not only both (1) to confer monopoly pricing power on that developer (if it is permitted to charge the public for access to it) and (2) to have the tendency to freeze the standard in place, given the obstacles to rulemaking change, but (3) it also is anti-competitive behavior vis a vis the other two SDOs.<sup>172</sup> An SDO's ability to continue to charge a premium price for an incorporated standard even after it has been superceded as a voluntary consensus standard (but before the governing law has been changed) is much harder to rationalize in terms of an appropriate SDO business model, than its ability to charge market prices for access to its voluntary consensus standards during their useful life as contemporaneous expressions of useful technical measures.<sup>173</sup> One perhaps understands SDO enthusiasm for converting their standards into law in these terms – so long as their ability to charge the public for learning them remains – but that makes the government's continued complicity in the process the more striking.

## V. CHANGING PART 51

Although the ACUS recommendation addressed only the practices of agencies using incorporation by reference in rulemaking, 5 U.S.C. §552(a)(1) places responsibility for the regulation of incorporation by reference practice in the hands of the Director of the Office of the Federal Register. He may permit incorporation by reference of material otherwise required to be published in the

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<sup>172</sup> Text at n. 10 above.

<sup>173</sup> Text at n. 37 above.

Federal Register only on determining that it will be “reasonably available” to those affected by it – a concept initially grounded in the expectation that commercial publishing houses would be including incorporated materials in their widely distributed, market-priced collections.<sup>174</sup> As outlined earlier, Part 51 of OFR’s regulations, unamended since 1982, establish the framework for these judgments, and they are remarkably deficient. Unadapted to the computer age, they imagine that only print copies need be available and, as administered, availability in public sources need be in two places only – the National Archives and the adopting agency’s own central library.<sup>175</sup> Beyond that, the regulations lack attention to *continued* availability, as they also lack attention to the price that copyright holders may ask for access to them from their hands. Part 51 requires that for regulations to be incorporated, they *must* impose legal obligations, and only one identified version of the standard may be incorporated – effectively requiring new rulemaking should the agency wish to follow SDO revisions over time. Despite the impulses of the NTTAA and Circular A-119 to limit incorporations to “technical standards” and not “regulatory standards or requirements,” any voluntary consensus standard may incorporated; nor is there apparent concern whether to access the incorporated material a consumer may obtain only the matter incorporated from the adopting SDO, or rather must purchase the whole of the standard as the SDO may have packaged it.

The same reduction of governmental resources for regulation as has contributed to agencies’ increasing reliance on privately generated standards (and reduced their capacity to monitor their

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<sup>174</sup> P. 27 above.

<sup>175</sup> One might think “reasonably available” copies of municipal ordinance adoptions by reference maintained at the city clerk’s office – and states and local governments too are migrating from physical to digital records. To regard two copies both located in Washington, D.C. as reasonably available for inspection tot he country is unsustainable.

creation) may help to explain if not excuse these deficiencies. When Part 51 was adopted in 1982, the legal affairs staff working on IBR (along with many other legal issues for the Federal Register) was three or four times the size (three) it is today.<sup>176</sup> Yet computer-age-oriented changes in the Federal Register and in another of the National Archives' activities have won both of the annual awards for innovation in government services that the Administrative Conference has conferred to date;<sup>177</sup> accommodating "incorporation by reference" to the resources of the computer age seems an obvious further step, made the more imperative by the requirements of E-Government and E-FOIA.<sup>178</sup>

Creation of a digital archive of incorporated standards to replace (or supplement) the current physical archive, under digital rights management to the extent that might be necessary, would satisfy the self-evident minimum standard of reasonable availability in the computer age. It would assure a persisting resource for standards that can remain law long after they have been replaced in the compendia of the SDOs that have created them.<sup>179</sup> (Of course individual agencies, or even ANSI, could provide such a resource, although having this in the same electronic place as the Code of Federal Regulations, with consequent ease of linkage, would be desirable.) It can be adminis-

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<sup>176</sup> Email to the author from Emily Bremer, Dec. 15, 2012.

<sup>177</sup> The first prize, for the transformed Federal Register (<http://www.acus.gov/congratulations-federalregister-gov/> and <http://www.archives.gov/press/press-releases/2012/nr12-46.html>) and the second NARA's citizen archivist initiative [as I write this award to NARA is a window item on acus.gov; one imagines it will shortly be in press releases.]

<sup>178</sup> For digitizing the thousands of incorporated, but almost inevitably superannuated, standards that remain "law" today, n. 125 above, and are available only in print form, one might create a citizens' archivist project, the initiative that won NARA's second Walter Gellhorn award for innovation.

<sup>179</sup> N. 44 above.

tered to lift any digital rights management regime that might be in place while the incorporated matter remains the active voluntary consensus standard of the SDO that created it, once that standard has been revised, so that the law “on the books” is no longer the contemporary voluntary consensus standard.

Other changes could significantly shrink the area of conflict between SDO copyright interests and the proposition that law is not subject to copyright. One at least would require little if any administration by OFR – to permit, even express a preference for, incorporations that invoke the European model, independently stating regulatory requirements and then identifying a voluntary consensus standard as one (but not necessarily the only) means by which those requirements can be met. Since agency rulemaking would not then be required to identify additional standards meeting those requirements, the modernity and flexibility of rules would be enhanced, and the need for rulemakings calling on OFR for judgment reduced. Requiring agency submissions to indicate steps taken during the comment period – how the proposed standard was made accessible to commenters, what materials from the responsible SDO had been placed in the FDMS – is called for by contemporary rulemaking doctrine that will be of greatest interest to the rulemaking agency; its recognition in Part 51 need require little administrative attention by OFR but would reinforce sound agency practice.

Largely self-enforcing, but arguably requiring some administrative attention from OFR, would be other measures to reduce if not eliminate the extent to which incorporations create “law” that both might be of significant interest to actors outside the affected regulatory communities (which

can often be expected to need to acquire access to consensus standards irrespective of their status as law) and could interfere with essential SDO financial needs if made public. NTTAA and OMB Circular A-119 have in view “technical standards,” not “regulatory standards or requirements.” Restoring Part 51’s initial requirement that matters to be incorporated have that character would tend to limit them in ways quite uninteresting to the general public – indeed, from that perspective, placing the incorporated matter outside the idea of “law” that citizens must be able to access to know their obligations. Second, agencies might be asked to demonstrate in their submissions for the Director’s approval that they had limited the material incorporated to the minimum extent required for their regulatory purposes – for example, incorporating only the definition of “dent” contained in a much more extensive collection of voluntary consensus standards applicable to tank trucks.<sup>180</sup> Doing so could permit inclusion of just that material in the electronic archive of incorporated standards, a fair use, without significant threat to SDO financial interests.

To the extent incorporations by reference persist that do importantly take on the characteristics of “law,” that are unmistakably “regulatory standards or requirements,” it is hard to avoid the conclusion that knowledge of them is the citizen’s right, and that monopoly pricing power over that knowledge cannot properly be conferred by recognizing copyright in them after the fact of their incorporation. Placing that information in an electronic archive under digital rights management could succeed in preserving the responsible SDO’s principal markets for its standards while accommodating that claim of right. That any financial consequences of being found to have taken private property by converting it into public law would fall on the adopting agency should operate

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<sup>180</sup> N. 46 above

as an incentive for the agency to bargain in advance, should it know this is the outcome it wishes, or to act in ways that maximally preserve SDO value when after the independent development of a voluntary consensus standard it discovers its regulatory relevance. Part 51 can be reconstructed in ways that reduce if not eliminate this field of conflict, and that is the effort OFR should undertake.

## VI. CONCLUSION

John Cooney, the Washington lawyer who chaired the Committee responsible for the ACUS recommendations, aptly described the central conflict that has animated this discussion as a “wicked question.”<sup>181</sup> The SDO community, valuable – essential – to effective regulation in the Twenty-First Century, requires the income generated by the sales of its uncontroversially copyrighted voluntary consensus standards to continue its work. And yet once such a standard has been converted into a legal obligation through its incorporation by reference, the proposition that law is not subject to copyright rears its head. If this conflict is not readily resolved, can it be eased? Can the abuses and failures set out in the preceding pages be avoided?

The preceding discussion has identified a number of measures by which ANSI or individual SDOs might improve their chances of preserving the income stream they receive from the sale of their voluntary consensus standards that are subject to agency conversion into legal obligations:

- Integrate with their standards explanatory materials or explanations that will not be incor-

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<sup>181</sup> Keynote speech, ANSI Legal Issues Conference panel on Incorporation by Reference, Washington, D.C., October 10, 2012.

porated elements and will enhance the value of the standards in users' hands;

- Avoid conflict with established federal rulemaking norms by assuring would-be commenters some form of free access to standards proposed for incorporation by reference during rulemaking notice and comment periods, and providing rulemaking agencies with complete records of their standards development process;
- Create an archive controlled by digital rights management techniques for access to standards once incorporated;
- Work with agencies to limit incorporations by reference where possible to relevant parts, and not the whole, of voluntary consensus standards, thus reducing the stakes in having the incorporated portions made public and arguably heightening the value of the standards as a whole;
- Price standards as voluntary consensus standards, making any standard that incorporation has converted into legal obligations freely available once the adoption of a revised voluntary consensus standard effectively converts any further sales of it into a sale of law;
- Encourage agencies to follow the European model, using standards as accepted means of compliance with regulation rather than as regulatory obligations per se.

Agencies, in turn, can take steps that minimize the threats to these valuable partners' proper claims to compensation for the public's use of their work-product:

- When an agency effectively initiates the process by seeking the development of a standard to be incorporated, take the contractual route of purchasing the desired standard for



an agreed price rather than permitting its price to be passed along to the affected public;

- Where at all possible, follow the European approach of stating regulatory requirements directly, and identifying incorporated standards as assured but not required means for complying therewith.
- Restrict the use of incorporation by reference, as the NTTAA and OMB Circular A-119 anticipate, to technical standards, and not "regulatory standards or requirements";
- Implement the ACUS recommendations to develop measures permitting limited access during rulemaking comment periods;
- Obtain, and incorporate in agency records during the rulemaking comment period, full SDO and ANSI records of the development of the standard proposed to be incorporated, including the resolution of any conflicts occurring at the time;
- Incorporate by reference only those elements of a voluntary consensus standard essential to its regulation, then made public if they create legal obligations;
- Make incorporated standards public, as by posting them on agency websites, as soon as their status as voluntary consensus standards has been ended by SDO revision of them;

Most important, however, are the steps that the Office of Federal Register should take in revising and administering its regulations implementing 5 U.S.C. §552(a)(1):

- At the very least, the OFR must bring its regulations into the 21st Century and the Information Age, redefining what makes incorporated material "reasonably available" in light of the possibilities of electronic storage, search, and access;

- It should require, as part of an agency showing that matter proposed to be incorporated is “reasonably available,” that free access of some character was given to it during the comment period, and that records of the SDO and ANSI process were available to commenters, as on FDMS;
- It should withdraw its current requirement that material incorporated by reference impose legal obligations, and prefer rules that independently state regulatory obligations and then identify the standard proposed for incorporation by reference as an assured but not necessary means of meeting those obligations, permitting flexible agency identification of future complying standards.
- It should refuse to permit incorporation by reference of standards that constitute "regulatory standards or requirements" rather than technical standards;
- If a standard as incorporated will nonetheless impose a fixed legal obligation, it should require that to be “reasonably available,” it, the SDO, or the responsible agency must have in place some means (such as an archive under digital rights management) by which knowledge of the obligation can be had without charge;
- To assure that incorporated standards continue to be “reasonably available” as they age, it should require an undertaking that the text of any incorporated standard will be posted to the agency’s electronic reading room as soon as its status as a voluntary consensus standards has been ended by an SDO revision of it.
- To supplement its archive of physical copies of incorporated standards, it should create a readily searched electronic archive of all incorporated standards, protecting under digital rights management only those standards that have not been replaced as voluntary consen-

sus standards by revised standards.