



# National Association of Secretaries of State

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# The Unique Problem of Standards Incorporated By Reference (IBR) Into Law



- Many countries are struggling with what to do about standards that are incorporated by reference into law;
- Arguments have been made that such standards should be freely available;
- Counter arguments have been made that such standards are copyright protected and that copyright should not yield to free access.

# USA - Requires “Reasonable Access” for IBR’d Standards



- Standards referenced in regulations published in the Federal Register are required to be made “reasonably available;”
- Some U.S.-based SDOs make IBR’d standards available on a read-only basis online and without fees (e.g. “ASTM Reading Room”, “API Government-cited & Safety Documents, “NFPA Free Access”);
- Other SDOs do not view “reasonable access” as requiring free, on-line access.

# Testimony Before the U.S. House of Representatives



- On January 14, 2014, the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on “The Scope of Copyright Protection.”
- Testimony on standards copyright-related issues was heard from:
  - Patricia Griffin, vice president and general counsel, ANSI; and
  - Carl Malamud, president, Public.Resource.org.

# Testimony Before the U.S. House of Representatives (continued)



- Ms. Griffin’s testimony addressed the: Unique nature of the U.S. standardization system;
  - Effectiveness of the current public-private partnership;
  - NTTAA of 1995 and the U.S. Office of Management and Budget (OMB) Circular A-119;
  - Government’s use of incorporation by reference (IBR);
  - Federal court rulings and guidance from the Administrative Conference of the United States and the National Archives and Records Administration (NARA); and
  - Availability of the ANSI IBR Portal and other similar efforts by SDOs to assure the reasonable availability of incorporated standards.

[Ms. Griffin’s written testimony](#) | [Mr. Malamud’s testimony](#) | [Video of the full hearing](#)

# NARA Petition



- In 2011 a petition was filed to amend the National Archives and Records Administration's (NARA's) regulations governing the approval of agency requests to incorporate materials by reference into the Code of Federal Regulations;
- □The Petition specifically requested that NARA revise the regulations at 1 CFR part 51 to define “reasonably available” to mean that IBR'd standards be available for free online;
- On October 2, 2013, NARA published in the [Federal Register Notice](#), a “Partial Grant of Petition, Notice of Proposed Rulemaking.”
- The deadline to respond was January 31, 2014.
- Link to [ANSI's Response](#).

# OMB Request for Comment (RFC)



- The Office of Management and Budget (OMB) is proposing to revise Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities"
- These proposed revisions are in light of changes that have taken place in the world of regulation, standards, and conformity assessment since the Circular was last revised in 1998.
- ANSI held a webinar on the RFC on March 6<sup>th</sup>
- Comments were solicited from ANSI members
- Final comments are due at OMB on May 12<sup>th</sup>

# Administrative Conference Recommendation 2011-5 Adopted December 8, 2011



- **Ensuring Incorporated Materials are Reasonably Available**
  - When considering incorporating by reference highly technical material, agencies should include in the notice of proposed rulemaking an explanation of the material and how its incorporation by reference will further the agency's regulatory purpose. [p.6]



# National Archives and Records Administration NPRM



- Revise § 51.5 to read as follows:

## § 51.5 How does an agency request approval?

(2) Discussing, in the preamble, the ways in which it worked to make the materials it incorporates by reference reasonably available to interested parties and how interested parties can obtain the materials;

# The Office of Management and Budget (OMB)



- proposed revision to Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities"
- How should my agency determine whether a voluntary standard is “reasonably available” in a regulatory or non-regulatory context?
- Whether the standards developer can provide a freely available, non-technical summary that generally explains the content of the standard in a way that is understandable to a member of the public who lacks relevant technical expertise.

# IBR Portal (<http://ibr.ansi.org>)



- The IBR portal provides “read-only” access to a subset of standards incorporated by U.S. Federal Agencies in rulemakings.
- Goal is to make it easier for interested parties to find IBR standards and to access them via the internet at no cost.
- One important motivation for providing this access is to encourage the U.S. Government’s reference to private-sector standards in regulations in lieu of having the government develop its own standards.
- Hosted standards: IEC, ISO, AHAM, AWS, IAPMO, IESNA, NEMA
- Links: APA, API, ASHRAE, ICC, MSS, NACE, NFPA, UL
- From October 28, 2013 (launch date) through the end of June 2014, there was an average of 200 visits to the portal per day.



for more information

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